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February 16, 2022

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Written *Ex Parte* Communication, MB Docket No. 18-349

Dear Ms. Dortch:

In the pending 2018 quadrennial review, the National Association of Broadcasters (NAB)[1] demonstrated that the current local radio ownership rule has no valid basis, and that its retention would be contrary to Section 202(h) of the 1996 Telecommunications Act (1996 Act), arbitrary and capricious under the Administrative Procedure Act (APA), and inconsistent with congressional intent to maintain a viable free, over-the-air (OTA) broadcast radio service capable of serving local communities in a highly competitive marketplace.[2] NAB and other commenters submitted studies and other data and information showing that radio broadcasters compete for audiences and advertisers with myriad other outlets and platforms,[3] and that the FCC should reform its local radio rule to reflect the competitive transformation of the media and advertising markets since 1996.

NAB now further responds to erroneous legal and economic arguments and various other inaccurate claims in the record about the standard to be applied in this quadrennial review, the competition for advertising revenue and audiences the FCC must consider, and the necessity and benefits of regulatory reform, especially for smaller broadcasters and stations

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *See* Comments of NAB, MB Docket No. 18-349, at 6-40 (Apr. 29, 2019) (NAB 2019 Comments); Reply Comments of NAB, MB Docket No. 18-349, at 6-55 (May 29, 2019) (NAB 2019 Reply Comments).

[3] *See, e.g.,* Exhibits A, B, and C to Joint Comments of Connoisseur Media, LLC, *et al*. (collectively, the Ten Joint Commenters), MB Docket No. 18-349 (Apr. 29, 2019) (2019 Joint Comments); Exhibits A, B, and C to Joint Comments of the Ten Joint Commenters, MB Docket No. 18-349 (Sept. 2, 2021) (Supplemental Joint Comments); BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace* (Apr. 19, 2019), Att. A to NAB 2019 Comments (BIA Radio Study); Comments of NAB, MB Docket No. 18-349, at 68-84 and Attachments A, B, C, F, G (Sept. 2, 2021) (NAB Supplemental Comments); Reply Comments of NAB, MB Docket No. 18-349, at 63-70 and Attachment A (Oct. 1, 2021) (NAB Supplemental Reply Comments).

1 M Street SE
Washington DC 20003 3512
Phone 202 429 5300
nab.org

in mid-sized and small markets and their audiences. While this submission primarily responds to invalid claims made by those opposing reform of the local radio rule, NAB's legal and economic analyses also refute arguments against ownership rule reform more generally, including for local TV broadcasters.

I. Some Commenters Continue to Inflate the Importance of Third Circuit Precedent and Blatantly Misread the Supreme Court's *Prometheus* Decision

In their reply comments, the musicFIRST Coalition and the Future of Music Coalition joined several other commenters who mistakenly assume that only the Third Circuit Court of Appeals and its precedent are relevant to this proceeding and who misinterpret the Supreme Court's *Prometheus* decision and its effects.[4] The Coalitions, for example, quoted the Third Circuit's 2004 opinion at some length,[5] and indicated that this appellate court's conclusions about interpreting Section 202(h) of the 1996 Act are controlling in this proceeding.[6] This position is plainly erroneous.

After the Supreme Court's unanimous reversal without remand of the Third Circuit's 2019 decision,[7] the lower court issued an order not only vacating its prior opinion and judgment but also expressly stating that "[t]his Court and panel do not retain jurisdiction."[8] As the only other circuit court of appeals to interpret or apply Section 202(h), the D.C. Circuit Court of Appeals' deregulatory interpretation of that section is every bit as applicable to this quadrennial review as the Third Circuit's interpretation, and, as NAB explained in previous comments, the D.C. Circuit's view of Section 202(h) is better aligned with the statute's language, structure, and intent.[9] The Coalitions did not even acknowledge the existence of D.C. Circuit cases applying Section 202(h), let alone argue that the D.C. Circuit's deregulatory reading of the quadrennial review statute was incorrect.

The Coalitions also did not address (or even cite) the actual language of Section 202(h) and that statute's alteration of the traditional "public interest" language of the 1934 Communications Act (Act) to direct the FCC to determine whether its ownership rules "are

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[4] *See* Reply Comments of musicFIRST Coalition and Future of Music Coalition (collectively, the Coalitions), MB Docket No. 18-349 (Oct. 1, 2021) (Coalition Reply Comments). NAB refuted those other parties' similarly erroneous arguments in its Supplemental Reply Comments, at 7-15.

[5] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

[6] *See* Coalition Reply Comments at 7-9.

[7] *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

[8] NAB Supplemental Reply Comments at 8 (quoting *Prometheus Radio Project v. FCC*, Judgment Order, Case Nos. 17-1107, *et al*. (May 7, 2021)).

[9] NAB Supplemental Reply Comments at 7-8; *see* NAB Supplemental Comments at 38-52.

necessary in the public interest *as the result of competition*."[10] Rather, these commenters insisted that "the public interest is the sole criteria for applying" Section 202(h), dismissing Congress's specific elevation of competition and disregarding its intent.[11] Indeed, the Coalitions' conception of the concerns the Commission should address in this quadrennial review extends "beyond just macroeconomics" to include "cultural, artistic, labor, and other public interest concerns."[12] That position is atextual, and any such broad conception of the

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[10] 1996 Act, § 202(h) (emphasis added). NAB has identified numerous tenets of statutory construction requiring the FCC to give full effect to § 202(h)'s specific language, including its singular identification of competition, rather than any of the other traditional public interest factors, localism or viewpoint diversity (or, indeed, diversity of any type). NAB Supplemental Reply Comments at 11-13; NAB Supplemental Comments at 38-41, 47-52. Contrary to the Coalitions' assertion, however, NAB did not contend in its supplemental comments that competition was the *only* factor relevant under § 202(h); rather, NAB stated that, given the language of § 202(h) and the structure of § 202, it was the *preeminent* factor. NAB Supplemental Comments at 38-41, 51-52; NAB Supplemental Reply Comments at 11-13. *See* Coalition Reply Comments at 6-7 (inaccurately stating that "NAB asserts" that § 202(h) is "designed only with global competition for revenue and audience in mind"). To the extent that the Coalitions and other parties also selectively quoted individual sentences (or parts of sentences) from NAB's Supreme Court briefs in *Prometheus,* NAB attaches to this letter its opening and reply briefs to make clear the context around any selective citations of NAB's court filings. One commenter, for example, quoted NAB's brief as stating that "Section 202(h) requires the Commission to assess its ownership rules in light of one factor and one factor only: 'competition.'" Supplemental Reply Comments of iHeart Commc'n, Inc., MB Docket No. 18-349, at 4 (Oct. 1, 2021) (iHeart Supplemental Reply Comments). This quote, however, omits the end of that sentence, which added "not the effect of its rules on minority and female ownership." Here, NAB was pointing out that the Third Circuit, in vacating the FCC's 2017 reconsideration order, had improperly replaced the competition analysis Congress prescribed in § 202(h) with its own atextual policy goals and its own panel precedent requiring exacting consideration of just one type of diversity, minority and female ownership. See Attachment A, NAB Supreme Court Opening Brief at 24-25. Rather, the only factor specifically mentioned in the statute is competition. For their part, the Coalitions included two quotes supposedly from NAB's opening brief but NAB cannot locate those quotes, at least at the pages cited by the Coalitions. *See* Coalition Reply Comments at 7 and nn. 15-16.

[11] Coalition Reply Comments at 7. Similarly, the National Hispanic Media Coalition (NHMC) stated that the FCC has discretion to determine whether its ownership rules serve the "public convenience, interest, or necessity," citing 47 U.S.C. § 303, but ignored the text of Section 202(h) and its specific alteration of the Act's traditional public interest standard to emphasize competition. *See* Reply Comments of NHMC, WC (sic) Docket No. 18-349, at 5-6 (Oct. 1, 2021).

[12] Coalition Reply Comments at 3.

public interest unmoored from the text, context, and purpose of Section 202(h) (or, for that matter, Section 303(r)) might well run afoul of the non-delegation doctrine.[13]

Like several other commenters, the Coalitions also misstated the Supreme Court's decision in *Prometheus,* claiming that the Supreme Court had "affirmed the Commission's broad authority in *implementing the statutory mandate of Section 202(h)*,"[14] and then somewhat misleadingly quoted the Court as having "elaborated" that: "'Judicial review *under that standard* is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained its decision.'"[15] Here, the Coalitions blurred the distinction between Section 202(h) of the 1996 Act and the Court's discussion of the APA.

To reiterate the obvious, the Supreme Court did *not* "affirm" the FCC's broad authority in implementing Section 202(h)[16] because that case was not decided under Section 202(h). Rather, *Prometheus* was decided solely under the APA, and the Court did not refuse to adopt NAB's arguments about the proper application of Section 202(h) because the Court did not reach those issues. The Court described the advocacy groups' challenge to the FCC's 2017 ownership order as "argu[ing] that the FCC's predictive judgment regarding minority and female ownership was arbitrary and capricious under the APA," citing 5 U.S.C. § 706(2)(A).[17] The Court disagreed with that argument, stating that the "APA's arbitrary and capricious standard requires that agency action be reasonable and reasonably explained," and explaining, as quoted above, that "[j]udicial review *under that standard* [i.e., the APA standard] is deferential . . . ."[18] Thus, the Coalitions' implication that the Supreme Court was somehow addressing Section 202(h) is in error, given that the Court decided *Prometheus* on APA grounds only and did not apply Section 202(h), interpret the language in that section, or

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[13] *See Nat'l Broad. Co., Inc. v. U.S.*, 319 U.S. 190, 209-210, 216 (1943) (stating that "the public interest" must "be interpreted by its context" to prevent "an unconstitutional delegation of legislative power"); *see also* Attachment B, NAB Supreme Court Reply Brief at 10 (explaining that a reading of the "public interest" unmoored from § 202(h) and allowing the FCC to retain, let alone tighten, any broadcast ownership rule based on any policy goal whatsoever would create non-delegation problems); Attachment A, NAB Supreme Court Opening Brief at 29-30 (explaining that, to avoid a non-delegation problem, "the public interest" must be "interpreted by its context," and pointing out that neither the historical context of § 202(h) nor the immediate statutory context suggested that the "public interest" as used in that provision required the FCC to consider minority and female ownership).

[14] Coalition Reply Comments at 8 (emphasis added).

[15] *Id*., quoting *Prometheus*, 141 S. Ct. at 1158 (emphasis added).

[16] *See* Coalition Reply Comments at 8.

[17] *Prometheus*, 141 S. Ct. at 1158.

[18] *Id*. (emphasis added).

opine on its meaning. Indeed, the Court expressly stated that, because it was reversing the Third Circuit's judgment "under ordinary principles of arbitrary-and-capricious review, we need not reach" NAB's alternative arguments about the text of Section 202(h).[19]

Another commenter continued to materially misread the *Prometheus* decision by repeating its erroneous claim that the Supreme Court "implicitly reject[ed]" NAB's argument about the primacy of competition under Section 202(h).[20] NAB previously refuted this argument, explaining that the Court did not reject any arguments about the meaning, application, or appropriate interpretation of Section 202(h). Rather, the Court simply did not reach any arguments about Section 202(h) because the *Prometheus* case could be and was decided on other grounds, specifically, as described above, whether the FCC's predictive judgment about minority/female ownership was arbitrary and capricious under the APA.[21]

II. The Coalitions' Reply Comments Are Riddled with Legal, Economic, and Factual Errors, as an Examination of Even a Single Page Illustrates

The Coalitions' reply comments opposing modernization of the 1996 AM/FM radio caps contain significant legal, economic, and factual inaccuracies. Taking a closer look at just one page of their filing reveals a host of inaccurate or misleading assertions, especially when coupled with cites that do not provide convincing (or any) support for the statements made.

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[19] *Id*. at 1160 n. 3. Relatedly, the Court did not state that the Commission *had* to consider minority and female ownership, but only found that the FCC's consideration of that issue in its 2017 reconsideration order satisfied APA standards. *See id*. (leaving open the question as to whether the FCC was even authorized under § 202(h) to consider minority/female ownership in its quadrennial reviews). The text of § 202(h) makes no mention of minority and female ownership. As NAB previously explained, moreover, the FCC has not in past quadrennial reviews justified or determined to retain, repeal, or modify structural ownership rules on the basis of minority/female ownership diversity. *See* NAB Supplemental Reply Comments at 13-14, n. 33; *see also* Attachment A, NAB Supreme Court Opening Brief at 37-42 (explaining that FCC has never treated minority/female ownership as a mandatory public interest factor in reviewing its ownership restrictions, much less a dispositive one, and that the FCC's recognition of minority/female ownership as a policy goal in some contexts does not convert it into a mandatory factor in § 202(h) reviews).

[20] iHeart Supplemental Reply Comments at 4-5 (stating that the FCC should not limit its quadrennial review to a narrower, competition-only analysis). *But see* Comments of Clear Channel Communications, Inc., MB Docket No. 09-182, at ii, 2, Heading I (July 12, 2010) (Clear Channel 2010 Quadrennial Comments) (stating that Congress intended § 202(h) to be an "engine" "driv[ing] deregulation of the broadcast industry" by requiring the FCC to repeal or modify ownership rules no longer necessary in the public interest "in light of current competition levels," and asserting that the "radio ownership rules are not necessary to address competition concerns").

[21] *See* NAB Supplemental Reply Comments at 15.

A. A Thorough Review of Just One Page of the Coalitions' Reply Comments Contain Errors Sufficient to Discredit their Entire Filing

Following its error-filled discussion of the Supreme Court's *Prometheus* decision and its erroneous suggestion that Third Circuit precedent controls this proceeding, the Coalitions begin page nine of their reply comments by citing the Third Circuit's 2004 decision again, this time for the proposition that the Commission "must still focus this proceeding on promoting local competition, diversity, and localism."[22] NAB does not dispute that the traditional goals of the FCC's ownership rules have been "fostering competition, localism and *viewpoint* diversity,"[23] but recitation of those goals does not answer the question how Congress's specific and singular identification of only one of the goals – competition – in Section 202(h) affects the FCC's obligations when conducting its mandated quadrennial reviews. Be that as it may, the Coalitions then described the last completed quadrennial review (2014) as concluding that the local radio caps "promote competition"; finding that the "benefits to the public interest as a result of keeping" those caps "were a sufficient basis for retaining the current rule;"[24] and "affirm[ing] previous findings that competitive local radio markets help promote viewpoint diversity and localism."[25] However, the Coalitions' contention that the Commission "must" focus on competition, diversity, and localism when considering the local

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[22] Coalition Reply Comments at 9 and note 20 (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004)).

[23] *Prometheus*, 141 S. Ct. at 1157 (emphasis added); *accord id*. at 1158; *see also id*. at 1161, 1163 (stating that the FCC's policy objectives for its ownership rules are "viewpoint diversity, competition, and localism" and that the "FCC's ownership rules – unlike some if its *non*ownership rules – were never designed to foster ownership diversity") (Thomas J., concurring) (emphasis in original). For many decades, the FCC has singled out viewpoint diversity as the type of diversity most relevant and important to its ownership rules. *See, e.g.,* Report and Order, Docket No. 14711, 45 FCC 1476, 1476-77 (1964) (when adopting "duopoly" rules based on service contour overlaps to restrict local TV, AM, and FM station ownership, FCC stated that its ownership rules "seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power"); *Review of Commission's Regulations Governing Television Broadcasting*, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3547 (1995) (in a proceeding on the TV ownership rules, stating that the FCC's concern for ensuring diversity of viewpoints "[t]raditionally" has been as strong as its concern about undue economic concentration); *see also* Attachment B, NAB Supreme Court Reply Brief at 16-19.

[24] Coalition Reply Comments at 9 and n. 21 (citing *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 33 FCC Rcd 12111, 12117 ¶ 11 (2018) (2018 NPRM), in turn citing *2010/2014 Quadrennial Review*, Second Report and Order, 31 FCC Rcd 9864, 9897, 9898-99, ¶¶ 82, 87 (2016)) (2016 Ownership Order).

[25] Coalition Reply Comments at 9 and n. 22 (citing 2016 Ownership Order, 31 FCC Rcd at 9897, 9898-99, ¶¶ 82, 87).

radio rules is not supported by their selective – and misleading – paraphrasing of the FCC's earlier orders, and fails to recognize the grounds on which the Commission in fact has relied upon in previously retaining the local radio rule.

For example, rather than the 2014 review finding that the current radio caps' "benefits" (plural) "to the public interest" were sufficient for retaining them, the Commission actually concluded in its 2014 review that the "local radio ownership limits . . . promote competition, and it found *that* public interest benefit" (*i.e.*, competition, singular) "to be a sufficient basis for retaining the current rule."[26] Similarly, characterizing the 2014 review as just affirming earlier findings that competitive radio markets "help promote viewpoint diversity and localism" is misleading. In fact, the Commission specifically concluded that, while the "competition-based" local radio rule "is consistent with our other policy goals" (*i.e.*, viewpoint diversity and localism) and "*may* promote such goals in various ways, we do *not* rely on those other goals as the basis for retaining the rule."[27] Instead, the Commission retained the existing local radio rule on the basis of competition alone.[28] This conclusion in the 2010/2014 quadrennial reviews is consistent with earlier ownership reviews, in which the FCC characterized the local radio rule as "competition-based" and did not justify the rule on the grounds of localism, format diversity, or viewpoint diversity.[29]

Indeed, commenters identifying viewpoint diversity as an important factor supporting retention of local radio limits not only ignore previous quadrennial reviews going back to 2002,[30] but also the FCC's most recent ownership decision, the 2017 reconsideration order

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[26] 2018 NPRM, 33 FCC Rcd at 12117 ¶ 12 (citing 2016 Ownership Order) (emphasis added).

[27] 2016 Ownership Order, 31 FCC Rcd at 9899 (emphasis added). In reaching this conclusion, the FCC cited NAB comments asserting that the Commission had failed to establish that the current local radio rule was necessary to promote localism, viewpoint diversity, or program diversity. *Id*. at n. 238. Evidently, the FCC felt unable to establish that the local radio rule promoted any of these other goals.

[28] *Id*.

[29] *See* NAB 2019 Reply Comments, at 8-9 and nn. 14-17 (quoting 2016 Ownership Order, 31 FCC Rcd at 9899; *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2075, 2077-78 (2008) (2008 Ownership Order); *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13738-39, 13742 (2003) (2003 Ownership Order)). Other commenters supporting the retention of local radio limits similarly contended that the FCC should (or must) consider localism and diversity and, like the Coalitions, ignored the fact that the FCC has justified retaining the radio rule on the grounds of competition, rather than localism, viewpoint diversity, program diversity, or ownership diversity. *See*, *e.g*., iHeart Supplemental Reply Comments at 5.

[30] *See*, *e.g*., Coalition Reply Comments at 9, 27; iHeart Supplemental Reply Comments at 5.

upheld by the Supreme Court last spring.[31] In eliminating the outdated cross-ownership rules in that order, the Commission discussed at length broadcast radio's "diminished contributions to viewpoint diversity and the variety of other media outlets that contribute to viewpoint diversity in local markets."[32] The Commission, moreover, explained that it had "long maintained that broadcast radio stations are not a primary source of viewpoint diversity in local markets."[33] Commenters citing the diversity provided by AM radio news/talk formats[34] or the large number of "news formatted" AM stations[35] do not address the FCC's previous findings that the "overwhelming majority of programming on news-talk stations is nationally syndicated rather than locally produced."[36] Extensive FCC precedent is thus contrary to parties' claims that the current caps on local radio station ownership are necessary to promote viewpoint diversity in local markets.

Beyond mischaracterizing or ignoring the FCC's previous decisions on local radio ownership, the Coalitions on this same page nine of their replies also make unsupported (or inaccurately supported) assertions about the harms of radio station consolidation. For example, the Coalitions claimed that local FM station consolidation specifically "has a history of harming localism with respect to news and information as well as music playlists."[37] As support for the claim that FM consolidation harms local news and information, the Coalitions cited a

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[31] *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) (2017 Reconsideration Order).

[32] *Id*., 32 FCC Rcd at 9825; *see also id*. at 9826 (concluding that the radio/TV cross-ownership rule was no longer necessary to promote viewpoint diversity in local markets); *id*. at 9821-22 (eliminating newspaper/broadcast cross-ownership rule and noting that the diminished contributions of radio stations to viewpoint diversity represented an additional and independent justification for eliminating the newspaper/radio cross-ownership ban).

[33] *Id*. at 9827; *see id*. at 9828-29 (additionally finding that platforms including the internet and cable contribute to viewpoint diversity in local markets). *See also 2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4465-66 (2014) (2014 Quadrennial FNPRM) (observing that the FCC had recognized as far back as 1975 that radio was not the equivalent of a TV station or newspaper as a source of news or information on local issues).

[34] *See* Supplemental Reply Comments of Salem Media Group, MB Docket No. 18-349, at 4, 6 (Oct. 1, 2021) (Salem Supplemental Reply Comments).

[35] Supplemental Comments of iHeart Communications, Inc., MB Docket No. 18-349, at 20-21 (Sept. 2, 2021) (iHeart Supplemental Comments).

[36] 2017 Reconsideration Order, 32 FCC Rcd at 9828 (citing 2014 Quadrennial FNPRM, 29 FCC Rcd at 4467, reporting only 30 commercial all-news radio stations in the U.S.). More recent reports found only 25 AM/FM commercial all-news radio stations in the country. Pew Research Center, *Audio and Podcasting Fact Sheet* (June 29, 2021).

[37] Coalition Reply Comments at 9.

single brief opinion piece that never referred to FM radio and only once mentioned radio specifically, in a sentence referring to newspaper layoffs and consolidation of television and radio stations generally.[38] This short opinion piece about media consolidation, the decline of newspapers, and the need to make the crisis in journalism an issue in the 2020 election makes notably more references to net neutrality and the open internet than it does to radio, let alone FM radio particularly.

With regard to the Coalitions' claims about FM station consolidation harming music playlists, one of the three items cited as support does not mention FM or music playlists at all, but focuses on the importance of expanding female, minority, and small business ownership of TV and radio stations and newspapers.[39] The Coalitions also cited two Future of Music Coalition (FMC) studies that now are, respectively, 20 and 16 years old and which were refuted specifically and in detail at the time.[40] Given that the audio marketplace of 2022 differs markedly from the marketplaces of 2002 and 2006 – in which smart phones, smart speakers and other digital devices did not yet exist and streaming was in its infancy – these studies are no longer relevant on that point alone. But even assuming they have some bearing on today's marketplace, NAB has shown those two studies to be replete with inaccuracies, misleading statements, and clear biases. For example, the 2002 FMC study misunderstood BIA's data to incorrectly calculate industry revenue shares, making the radio industry appear much more concentrated than was the case.[41] For part of this 2002 study, FMC conducted a public opinion survey about radio, but many of the questions were structured in a way to bias responses, and the representativeness of its survey sample was questionable.[42] FMC's 2002 study also complained about overlap between radio stations' playlists, but a 2002 study on playlist diversity conducted by Commission staff "suggest[ed] that diversity has grown significantly among stations within the same format and within the same city," and stated that stations with the same "formats competing within the same

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[38] *Id*. at n. 23 (citing Michael Copps & Newton Minnow, *Journalists Must Make the Shrinking Free Press a Campaign Issue*, SEATTLE TIMES (Sept. 29, 2019)).

[39] *Id*. at n. 24 (citing Barack Obama & John F. Kerry, *Media Consolidation Silences Diverse Voices*, POLITICO (Nov. 7, 2007)).

[40] *Id*. (citing *Radio Deregulation*: *Has it Served Musicians and Citizens?*, FUTURE OF MUSIC COALITION (Nov. 18, 2002); PETER DICOLA, FUTURE OF MUSIC COALITION, FALSE PROMISES, FALSE PREMISES; A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY 50-81 (2006)) (excessive capitalizations in original).

[41] *See* Reply Comments of NAB, MB Docket No. 02-277, at 69 and n. 127, Attachment B at 1, Attachment C at 1 (Feb. 3, 2003) (NAB 2003 Reply Comments).

[42] *Id*. at Attachment B, 1-2. For example, several survey questions included slanted, paragraph-long lead ins that could clearly have influenced respondents' answers.

market appear to differentiate themselves to appeal to their listeners."[43] Thus, according to the Commission's 2002 study, "listeners in local radio markets may have experienced increasing song diversity" since 1996.[44]

Undeterred by valid criticisms of its 2002 study, FMC in 2006 released the second study cited in its reply comments here. In 2007, BIA conducted a thorough critique and refutation of this study, identifying numerous errors, exaggerations, and biased assumptions and conclusions.[45] Indeed, just the executive summary of BIA's refutation listed 14 "notable shortcomings" of the FMC study, and BIA concluded that this study "lacks a critical understanding of the radio industry, is dismissive of any alternative interpretations of the data, and is wholly self-fulfilling in reaching pre-determined conclusions."[46] Although NAB will not detail here all 14 of the FMC study's more significant deficiencies, one of the 2006 study's most egregious mistakes was repeating the *exact same error* in calculating radio industry revenue shares that it had committed in 2002 (thus again making the industry appear more consolidated than was the case), even though FMC had been directly informed of its earlier mistake.[47]

Finally, in the last sentence of this error-strewn page nine, the Coalitions claimed that smaller AM/FM clusters of commercial stations, independent commercial radio stations, and

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[43] FCC, George Williams, Keith Brown and Peter Alexander, *Radio Market Structure and Music Diversity,* at 16 (Sept. 2002) (available at: https://www.fcc.gov/reports-research/working-papers/radio-market-structure-and-music-diversity).

[44] *Id*. at 18. *See* NAB 2003 Reply Comments at 67 and n. 121 (explaining that increases in song diversity *within* local radio markets is the type of diversity most important to local audiences, who have relatively limited interest in song diversity across distant markets). A 2010 GAO Report similarly found that within individual markets, the top radio formats differ from the top formats nationally, "indicating that programming decisions are locally based on the preferences and interests of listeners within a given market." Government Accountability Office, GAO-10-369, *Media Programming*: *Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, at 28 (Mar. 2010).

[45] Mark R. Fratrik, *A Review of the Future of Music Coalition Study: Missing a Basis in the Reality of the Radio Industry*, BIA Financial Network (Nov. 1, 2007), attached to Letter from J. Timmerman, NAB, to Marlene H. Dortch, FCC, MB Docket No. 06-121 (Nov. 1, 2007).

[46] *Id*. at i-ii.

[47] *Id*. at 6-7 and n. 20. In 2003, NAB had sent a letter to FMC detailing its mistake in considerably overstating radio industry concentration and identifying several other errors in its 2002 study. *See* NAB 2003 Reply Comments at Attachment B (Letter from Kathleen M. Ramsey, Senior Vice President, NAB to Jenny Toomey, Executive Director, Future of Music Coalition (Jan. 6, 2003)). NAB also discussed FMC's error in exaggerating radio industry consolidation in its reply comments in the 2002 quadrennial review. *See* NAB 2003 Reply Comments at 69 and n. 127.

noncommercial stations remain the primary sources in local communities for airplay of local or regionally-based performers. To support this claim, the Coalitions cited a single page of their April 2019 comments in this proceeding.[48] But when checking the cited page of these earlier comments, NAB only found the same flat assertion with no supporting evidence or cites to any supporting material.

B. The Coalitions Make Many Other Erroneous and Immaterial Arguments

While this single page of the Coalitions' replies contains sufficient misstatements and inaccuracies as to cast doubt on their entire comments, the Coalitions made myriad other unmeritorious or irrelevant arguments. For example, they asserted that "[s]pectrum is a scarce public resource," as if that somehow justified restrictive broadcast-only ownership rules and greater regulation of local stations generally.[49] The concept of scarcity – whatever its relevance might have been when broadcast stations were the only electronic media – lacks relevance in a 21st century marketplace characterized by proliferating outlets, platforms, digital devices, and consumer choices. Indeed, the Commission concluded 35 years ago that "there is no longer scarcity in the number of broadcast outlets" available to the public,[50] and Congress found over 25 years ago that the "scarcity rationale for government regulation [of broadcasting] no longer applies."[51] Radio broadcast licenses, moreover, are not "scarce" in the sense of greater demand for licenses than supply. In last year's auction of AM and FM construction permits (CPs), 30.2 percent of the CPs on offer were not acquired by anyone, even though this auction was the first for full power radio CPs since 2015.[52] Similarly, in the five full power FM auctions prior to Auction 109, nearly one-

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[48] Coalition Reply Comments at 9 and n. 25 (citing *2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Joint Comment of musicFIRST Coalition & Future of Music Coalition, MB Docket No. 18-349, at ii (Apr. 29, 2019)).

[49] Coalition Reply Comments at 2. But "[a]ll economic goods are scarce," and broadcast frequencies are not "uniquely scarce." *TRAC v. FCC*, 801 F.2d 501, 508-509 and n. 4 (D.C. Cir. 1986); *see also* Report and Order, 100 FCC 2d 17, 19 (1984) (1984 Ownership Order), *modified on other grounds*, 100 FCC 2d 74 (1985) (concept of scarcity "fails to distinguish broadcasting in any practical sense from other businesses, including particularly the nonbroadcast media").

[50] *Syracuse Peace Council*, 2 FCC Rcd 5043, 5054 (1987), *affirmed*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989); *accord, e.g., TRAC*, 801 F.2d at 508 n. 4.

[51] H.R. Rep. No. 104-204, at 54 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 18 (noting a 30 percent increase in the number of broadcast stations in just the previous ten years).

[52] Auction 109 offered four AM CPs and 135 FM CPs, but the winning bidders acquired only 97 CPs. *See Auction of AM and FM Broadcast Construction Permits*, Public Notice, AU Docket No. 21-39, DA 21-780 (July 1, 2021); *Auction of AM and FM Broadcast Construction Permits Closes*, Public Notice, AU Docket No. 21-39, DA 21-983 (Aug. 12, 2021).

quarter of the CPs on offer went unsold.[53] This evidence from multiple spectrum auctions indicates an abundance of available broadcast radio licenses, rather than a shortage.[54]

Ownership or other regulations also cannot be justified on the myth that broadcasters got their licenses "for free," as the Coalitions claimed.[55] This contention is factually incorrect. First, the Coalitions appear unaware that, in the Balanced Budget Act of 1997, Congress required the Commission to award new commercial broadcast (radio and TV) licenses via auctions.[56] Thus, for nearly a quarter of a century, broadcasters have paid market price to the government for any permits for new stations.

Second, the vast majority of broadcasters – both before and after 1997 – have paid full market price for their licenses by acquiring them on the secondary market via assignments of licenses and transfers of control. As early as 1983, FCC staff estimated that 71 percent of radio stations had changed hands through market purchases.[57] A 2014 study showed that 92 percent of all existing full power TV station licensees had paid market rates to the collective tune of about $50 billion for their spectrum licenses on the secondary market.[58] Since that time, even more licensees have paid even more money to acquire their licenses in the secondary marketplace, paying full market price. In any event, other entities, including DBS licensees and cellular telephone licensees, received their initial licenses without paying the government (or anyone else) for them, and those licensees are unencumbered by broadcast-type ownership or other restrictions.[59] And regardless of how broadcasters obtained their licenses, they all had to invest in infrastructure, equipment, programming, and personnel, without which no service can be provided. Broadcast licensees as a group further

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[53] NAB staff examined the last five auctions for full power FM CPs before Auction 109 concluded in August 2021, and found that the FCC retained 147 unsold CPs, which represented 23.4 percent of the total number of CPs offered in those auctions.

[54] Commenters in this proceeding also described the low demand for operating broadcast radio stations, noting the number of stations going dark, the decline in the volume of station sales, and the lack of any buyers for certain stations, especially those in mid-sized and small markets. *See* Supplemental Joint Comments at 26-27 and Attachment C, Decl. of W. Lawrence Patrick.

[55] Coalition Reply Comments at 2.

[56] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920 (1998).

[57] 1984 Ownership Order, 100 FCC 2d at 19 n.3.

[58] *See* Jeffrey A. Eisenach, *The Equities and Economics of Property Interests in TV Spectrum Licenses*, Navigant Economics, at 10-11 (Jan. 2014), *available at* [Microsoft Word - Eisenach NAB Property Interests in Television Spectrum Licenses Final 011314b]

[59] *Id*. at 2, 14-15.

pay tens of millions of dollars in regulatory fees to the FCC every year,[60] and TV broadcasters, per government requirements, spent millions of additional dollars per station to convert to digital broadcasting.[61] Ownership or other broadcast regulations therefore cannot be justified by the Coalitions' spurious claims about "free" licenses.

The Coalitions again raised yet another specious argument, claiming that retaining current radio ownership restrictions is justified because of alleged "inequities" in "AM/FM policy" – specifically, Congress's long-standing refusal to impose performance fees for OTA radio broadcasts of music under copyright law.[62] As NAB has previously explained,[63] this difference in copyright law, contrary to the Coalitions' meritless claims, does not give local radio stations a "significant" or "unfair competitive advantage" over all other audio delivery platforms or justify retention of outdated FCC ownership rules.[64]

NAB urges the Commission here to decline the music industry's repetitive invitation to connect the structural ownership rules to a decades-long legislative debate about copyright policy. The Coalitions' and the multi-billion-dollar record labels' frustration that Congress still refuses to change copyright law by imposing performance rights fees on OTA radio broadcasts is not a reason for the FCC to accept any of the Coalitions' unsuccessful legislative talking points.[65] And third parties' unhappiness over congressional decisions on copyright law is no reason for the Commission to disregard its statutory obligation under Section 202(h) to "ensure" that its radio ownership rules "keep pace with the competitive changes in the marketplace."[66]

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[60] In 2021, radio and TV broadcasters paid $55.9 million in regulatory fees. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 21-190, FCC 21-98, at ¶ 9 (Aug. 26, 2021).

[61] During the DTV transition, stations reported spending $3-$4 million each on digital transmitters and towers, and additional amounts on replacing production equipment and other infrastructure. *See* Comments of NAB, MB Docket Nos. 06-121, at 91 and notes 212-213 (Oct. 23, 2006).

[62] Coalition Reply Comments at 3.

[63] *See* Reply Comments of NAB, GN Docket No. 20-60, at 19-22 (May 28, 2020) (NAB Communications Marketplace Reply Comments); Reply Comments of NAB, MB Docket No. 18-227, at 5-10 (Oct. 9, 2018); NAB 2019 Reply Comments at 32-33, n. 98.

[64] Coalition Reply Comments at 3, 16.

[65] Congress most recently considered and again rejected requiring terrestrial radio broadcasters to pay performance rights fees to record labels for over-the-air broadcasts of sound recordings when it crafted and passed the Music Modernization Act of 2018.

[66] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (stating that the "very purpose of § 202(h)" is to "function as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the

AM/FM radio stations do not have a "significant" competitive advantage over other participants in the audio marketplace merely because Congress has declined to place performance rights fees on local stations' OTA music broadcasts. While copyright law treats different audio outlets differently in this regard, terrestrial radio stations have many other costs and burdens that do not apply to other audio market participants, especially online ones, several of which (*e.g.*, Apple Music, YouTube Music, Amazon Music) are owned by some of the largest corporations in the world.[67] Every terrestrial radio broadcaster must acquire an FCC license by paying market price for it either in an auction or via an FCC-approved assignment or transfer transaction from an existing licensee; build, acquire and/or lease, and then maintain extensive infrastructure, including transmitters, towers, antennas, and real property to house them; bear the substantial costs (*e.g.*, electricity) of transmitting an OTA signal to its community of license; comply with FCC regulations ranging from keeping online public and political files and station logs to providing EAS alerts to preparing quarterly issues/programs reports; pay mandatory regulatory fees to the government; and fulfill its statutory obligation to serve its community of license to qualify for renewal of its license every eight years. Above all, FCC-licensed radio broadcasters provide their signals free to the public and – unlike their satellite and online competitors – cannot charge subscription fees to recoup any of their costs. And, as discussed in NAB's earlier comments, OTA broadcasters' almost total dependence on advertising revenue make them more vulnerable than many of their competitors to fluctuations in the ad market, such as the extreme decline in the ad market resulting from the pandemic and associated recession.

Given the substantial costs and myriad burdens borne by terrestrial broadcasters but not by other audio providers, current differences in copyright law do not result in AM/FM stations having a significant or unfair – or, indeed, any relevant – competitive advantage and are not a valid reason for the FCC to retain outdated radio ownership caps, as the Coalitions contend.[68] After all, if terrestrial radio stations have a significant and unfair competitive advantage over all other audio outlets and services, then how have those services managed to expand and thrive, while many AM/FM stations, especially those outside the largest markets, struggle to earn adequate advertising revenues to cover their fixed costs and

marketplace'") (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004)). See *also Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (stating that § 202(h) was intended "to continue the process of deregulation" begun in the 1996 Act).

[67] The other two leading online music brands are Spotify and Pandora (the latter owned by SiriusXM), both of which have market capitalizations far exceeding those of even the largest terrestrial radio companies. *See* NAB Supplemental Comments at 25, 72 n. 229.

[68] *See*, *e.g.*, Joint Comment of musicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-349, at 3-4 (Apr. 29, 2019) (Coalition 2019 Comments); Coalition Reply Comments at 2-3, 16.

remain viable?[69] The illusory competitive advantage posited by the Coalitions should not be considered in this quadrennial review, particularly given the complete lack of evidence establishing the existence of any such advantage.[70]

As a practical matter, moreover, retention of analog-era radio ownership caps would do nothing to benefit the music industry generally or performers specifically. While the Coalitions believe that imposing performance fees on stations will financially benefit the music industry, the FCC lacks authority to require performance fees, and its maintenance of out-of-date radio ownership rules will not enhance the music industry's finances but only harm radio stations and their service to audiences. Whether FCC rules allow a broadcaster to own two, four, six, eight, or ten stations in local markets of whatever size has *no* effect on the royalties that stations do or do not pay to different entities in the music industry. Thus, the Coalitions' support here for ownership restrictions on local stations appears to be little more than an expression of grievance over the music industry's failure to persuade Congress to impose additional royalty payments on local radio stations' OTA broadcasts of music, or potentially to continue its own dominant position in negotiations for other fees with radio stations.

In any event, the music industry's repetitive complaints about consolidation in radio station ownership rings like the hollowest of bells. The recorded music industry is dominated by just *three* major labels, which alone were projected to generate over $20 billion in revenue in 2021.[71] By comparison, the radio industry with over 11,000 full power commercial AM/FM

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[69] *See*, *e.g.*, BIA Radio Study at 14-15, 31-35; NAB Supplemental Comments at 75-84 and Attachments C and G; NAB Supplemental Reply Comments at 65-70 and Attachment A.

[70] The Coalitions' habit of citing sources that do not support their contentions further undermines their arguments about copyright royalties. For example, they cite a D.C. Circuit Court of Appeals decision for the proposition that large AM/FM radio clusters enjoy a competitive advantage over smaller radio counterparts due to their local market share "while also holding an advantage over digital audio delivery platforms who, unlike AM/FM, pay for the privilege of using sound recordings." Coalition Reply Comments at 16 and n. 57. The case cited, *SoundExchange*, *Inc*. *v*. *Copyright Royalty Board*, 904 F.3d 41, 45 (D.C. Cir. 2018), says nothing about any alleged competitive advantage AM/FM radio has over digital audio platforms at the page cited or anywhere else in the opinion. This case concerns the rates, set by the CRB, webcasters pay to license copyrights in digital sound recordings, *id*., and shows regulatory *parity* in the digital environment between online-only webcasters and webcasters that stream music online but also are broadcast licensees airing music OTA. *Both* types of webcasters pay performance rights fees for their online streaming of copyrighted sound recordings. *See id*. at 48 (in upholding CRB's royalty rates for ad-based commercial noninteractive webcaster services, court stated that Pandora Media and iHeart Media were "two webcaster companies that offer such services"). And to be clear, broadcasters also pay royalties to the composers of music they air OTA *and* stream online.

[71] Tim Ingham, *The Major Music Companies Now Turn Over $2.5M Every Hour – And Will Generate More Than $20BN Between Them This Year*, Music Business Worldwide (Aug. 10,

stations owned by over 3,000 separate owners cumulatively generated only a projected $11.7 billion in total ad revenue in 2021.[72] In short, if the Coalitions want to complain about concentration in the audio – and particularly the music – marketplace, they should focus their ire elsewhere.

III. Those Commenters Opposing Needed Reform of the Local Radio Rules Offer Illogical, Inconsistent, and Erroneous Arguments About the Relevant Marketplace

In its most recent statutorily-required report to Congress on competition in the communications marketplace, the FCC found that "[t]hree categories of audio providers dominate the audio marketplace in the United Stations: 1) terrestrial radio providers, 2) satellite radio, and 3) online audio providers."[73] Similarly, the FCC concluded that the "video marketplace continues to be dominated by the three categories of participants that have defined the market for the past decade: multichannel video programming distributors (MVPDs), online video distributors (OVDs), and broadcast television stations."[74]

The Coalitions, however, not only failed to recognize the FCC's definition of the relevant audio market participants, but also disagreed with it by claiming that NAB "incorrectly" defined the marketplace as including nonbroadcast audio delivery platforms rather than just local broadcast radio.[75] The Coalitions' assertion about market definition cannot be taken seriously because just one page prior to claiming that the correct market was limited to "local broadcast radio," the Coalitions contrarily acknowledged that non-broadcast audio platforms

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2021) (available at: https://www.musicbusinessworldwide.com/major-music-companies-now-turn-over-2-5m-every-hour-and-will-generate-more-than-20bn-between-them-this-year/). And if performance rights fees were imposed on radio stations' OTA music broadcasts, those fees would be paid to the holders of the copyrights in the sound recordings, *i.e.*, usually the record labels. The extent to which performers would share in any such fees depends on the terms of their contracts with the labels.

[72] BIA Media Access Pro (as of Dec. 1, 2021); BIA Advisory Services, *BIA Revises its U.S. Local Ad Forecast – Expects Revenues from Traditional and Digital to Hit $142B* (July 22, 2021); *Broadcast Station Totals as of Sept. 30, 2021*, FCC News Release (Oct. 4, 2021). Concentration in radio ownership and listenership is further fragmented by the approximately 4,200 full power noncommercial educational (NCE) FM stations in the U.S. owned by many additional owners. According to BIA, as of December 1, 2021, there were 4,560 separate owners of full power commercial and NCE AM/FM stations.

[73] *2020 Communications Marketplace Report*, 36 FCC Rcd 2945, 3086-87 (2020) (identifying the "major participants in today's marketplace for the delivery of audio programming" as terrestrial radio broadcasters, satellite radio, and online audio providers); *accord Communications Marketplace Report*, 33 FCC Rcd 12558, 12630-31 (2018).

[74] *2020 Communications Marketplace Report*, 36 FCC Rcd 2945, 3047 (2020).

[75] Coalition Reply Comments at 12.

compete in local markets against terrestrial radio station owners. Specifically, the Coalitions stated that small FM broadcasters in any "given *local market* already must compete *locally* against" larger FM radio clusters "in their marketplace *and every global audio platform*."[76] Given that the Coalitions recognized myriad audio platforms as competitors to local radio stations in local markets, they cannot consistently or logically argue that the correct market for the competition analysis required by Section 202(h) be limited to "local broadcast radio."

The Coalitions' claim that the relevant market consists only of local AM/FM stations is, moreover, inconsistent with their long-standing complaint that broadcast radio stations have a significant and unfair competitive advantage over other audio delivery platforms. After all, if terrestrial radio stations do not compete in the same market as other audio platforms, then how can AM/FM stations possibly have any (let alone a significant) competitive marketplace advantage over those other audio outlets? The Coalitions' attempt to limit the relevant market to only some of the audio marketplace competitors identified by the FCC in its congressional reports cannot even survive scrutiny of their own pleading.

Nor can the Coalitions,' iHeart's, and other commenters' wish to treat terrestrial radio stations as sealed in their own separate market find support in the record,[77] which shows fierce competition between radio broadcasting and other media and advertising outlets. Indeed, NAB finds it extraordinary that broadcasters today must still be belaboring the obvious -- that "non-radio outlets" compete with traditional broadcast radio for "audience and advertising," a fact the Commission recognized *in 1992* when it loosened the local radio rule.[78] Ironically, in an even earlier order modestly adjusting the local radio rule, the FCC found that an NAB study on radio market concentration had used a "very narrow" definition of the relevant market, limited only to commercial radio stations, and thus had "*overstate*[*d*]" the stations' potential market power by not measuring competition from TV stations, newspapers, and cable TV systems.[79] The FCC recognized this broader competitive

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[76] *Id*. at 11 (emphasis added).

[77] Coalition Reply Comments at 12; iHeart Supplemental Comments at 9-10; Comments of iHeart Communications, Inc., MB Docket No. 18-349, at 9-13 (Apr. 29, 2019) (iHeart 2019 Comments); *see also* Salem Supplemental Reply Comments at 4 (quoting iHeart Supplemental Comments); Letter from Leadership Conf. on Civil and Human Rights to Acting FCC Chair Rosenworcel and Commissioners, at 3, Heading B, MB Docket No. 18-349 (Sept. 30, 2021) (claiming that broadcasting is not in "direct competition" with "other media").

[78] *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2756, 2759 (1992) (describing the growing competition to radio stations causing "tremendous market fragmentation" resulting in many radio operators' experiencing "serious economic stress," and referring to local cable and broadcast TV as competitive to radio in the local ad market) (1992 Radio Ownership Order).

[79] First Report and Order, 4 FCC Rcd 1723, 1727 (1989) (emphasis in original) (finding the record indicated that TV stations, newspapers, and cable TV systems competed for advertising with radio).

advertising market, encompassing broadcast TV and radio, newspapers, and cable TV, in numerous ownership proceedings in the 1990s, before digital media and ad platforms also became strong competitors to broadcast stations.[80] NAB understands the motivations of these commenters and perhaps the FCC as well. Only if the Commission denies the obvious, as well as congressional intent in Section 202(h), could it justify the retention of the current local radio (and TV) restrictions in its quadrennial reviews.

A. The Record Shows that Broadcast Stations Compete in Broad Content and Advertising Markets

As examination of the record in this proceeding clearly demonstrates that radio (and TV) broadcast stations compete against nonbroadcast audio (and video) content providers for consumers' time and attention and against a range of platforms, including online, for advertising dollars. NAB cannot possibly repeat here all the comments, studies, analyst reports, and broadcaster declarations showing in detail that radio stations in local markets across the country have lost advertisers and vital ad revenues to digital competitors and audiences to non-broadcast providers that consumers routinely access through a still growing range of digital devices.[81]

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[80] *See*, *e.g*., *1998 Biennial Regulatory Review*, Notice of Inquiry, 13 FCC Rcd 11276, 11277-78 (1998); *Stockholders of Renaissance Communications Corp*., Memorandum Opinion and Order, 12 FCC Rcd 11866, 11886 (1997); *Capital Cities/ABC*, *Inc*., Memorandum Opinion and Order, 11 FCC Rcd 5841, 5892 (1996); *see also* Report and Order, 14 FCC Rcd 12903, 12907 (1999) (relaxing the local TV and radio/TV cross-ownership rules and recognizing that "clustering" of cable systems enabled cable to compete more effectively for local ad dollars). Earlier economic studies similarly concluded that "radio and newspaper advertising are substitutes for TV advertising" in local markets. R.B. Ekelund, Jr., G.S. Ford, and J.D. Jackson, *Are Local TV Markets Separate Markets?,* 7 Int'l J. Econ. Bus. 79, 91-92 (2000).

[81] *See*, *e.g*., NAB 2019 Comments at 7-28; BIA Radio Study at 3-18; NAB 2019 Reply Comments at 30-44; NAB Supplemental Comments at 55-78 and Attachments F and G; NAB Supplemental Reply Comments at 63-69 and Attachment A; 2019 Joint Comments at 6-21 and Exhibits A, B, and C; Joint Reply Comments of Ten Joint Commenters, MB Docket No. 18-349, at 3-9 (May 29, 2019) (2019 Joint Reply Comments); Supplemental Joint Comments at 6-28 and Exhibits A and B; Joint Reply Comments of Ten Joint Commenters, MB Docket No. 18-349, at 4-7 (Oct. 1, 2021) (Supplemental Joint Reply Comments); Joint Reply Comments of American General Media, Beasley Media Group Licenses, LLC, Bonneville Int'l Corp., Bustos Media Holdings, LLC, Claro Commc'n, LTD, Cumulus Media Inc., Davis Broadcasting, Entercom License, LLC, Galaxy Commc'n, LLC, Golden Isles Broadcasting. LLC, HEH Commc'n, LLC, HJV Limited Partnership, L.M. Commc'n, Mecca Commc'n, Inc., Meruelo Media, LLC, Monticello Media LLC, Oconee Commc'n Co., LLC, QBS Broadcasting, LLC, Radio Training Network, Inc., Roberts Commc'n, Inc., Southern Stone Commc'n, LLC, Tri-State Commc'n, Inc., Withers Broadcasting Companies/Dana Commc'n Corp., Woman's World Broadcasting, Inc., and Word Christian Broadcasting, Inc., MB Docket No. 18-349, at 6-15 and Attachment B (May 29, 2019) (Joint Reply Comments of 25 Broadcast Licensees).

Respected analysts, including Kagan, have documented the disruption and transformation of the national and local U.S. advertising market by online and mobile ad platforms, at the expense of traditional media including radio and TV broadcasting.[82] Numerous radio broadcasters across the country have attested in detail about the very substantial amounts of revenue and the types of advertisers (running the gamut of businesses across the economy) lost to digital advertising competitors in specific local radio markets.[83] NAB documented the significant impact that the shift in ad dollars away from broadcast radio toward other advertising options, especially digital, have had on the revenues of the radio industry as a whole and on FM stations specifically.[84]

Given these uncontroverted data about local radio stations' competitive struggles to earn ad revenues in today's market, and based on their own research and surveys of ad buyers, industry analysts unsurprisingly have concluded that "local advertisers see radio and digital advertising as substitutes" as they "shift[] dollars back and forth between these media."[85] Economic studies over the years also have shown that broadcast stations in local markets compete with other traditional media outlets for advertising revenue and, more recently, with

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[82] *See*, *e.g.*, NAB 2019 Comments at 22-23 and note 89 (discussing several Kagan advertising market reports documenting the shift in ad dollars from traditional media to mobile and internet); BIA Radio Study at 10-13 (documenting that increased competition from other ad platforms and erosion of audience to alternative audio sources have weakened the radio industry's ability to generate ad revenues); NAB Supplemental Comments at 64-66 (discussing analysts' findings that the pandemic has accelerated the digital transformation of the advertising market).

[83] *See* 2019 Joint Comments at Exhibit C (declarations of ten radio broadcast executives); Joint Reply Comments of 25 Broadcast Licensees at 10-13.

[84] *See*, *e.g.*, NAB Supplemental Comments at 75-78 and Attachment G; NAB Supplemental Reply Comments at 66-67 and Attachment A; Comments of NAB, GN Docket No. 20-60, at 16-23 (Apr. 27, 2020).

[85] Supplemental Joint Comments at Exhibit B, Report by Gordon Borrell, CEO of Borrell Associates, at 4. This report also documented the continued erosion of radio and TV broadcasters' share of local advertising due to still increasing competition by the technology platforms. *Id*. at 2-5 (projecting continued growth in digital media's share of all local advertising revenue, at the expense of radio and TV stations' local ad share). *Accord* 2019 Joint Comments at Exhibit B, Statistical Data from Borrell Associates, at 4 (from its research and assessment of the local advertising market, concluding that radio and digital advertising are substitutes). *See also* NAB 2019 Comments at 26-27 (citing, *inter alia*, a study estimating the percentage that radio advertising spend contracts for every one percent increase in internet and mobile ad spend).

digital ad platforms.[86] Similarly, industry analysts have documented the direct competition between terrestrial radio stations and digital audio options for audiences' time and attention.[87] The wider media and entertainment industries have characterized these changes in advertising and in the consumption of audio and video content as "paradigm-shifting"[88] and as "increasingly leading to power shifts within the industry."[89] The Commission here cannot ignore the media environment's transformation by continuing to analyze competition for purposes of its ownership rules as limited only to one narrow segment, radio (or TV) broadcast stations.

Interestingly, certain commenters opposing reform of the local radio rules do not seriously dispute or attempt to refute the indisputable facts about the high and rising levels of

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[86] *See* NAB 2019 Comments at 26-27, 55-56 (identifying and briefly describing various studies supporting a broader advertising market, including studies finding that "online" and "offline" advertising outlets compete with each other); J. Eisenach, L. Wu, A. Card, R. Kulick, J. Scalf, I. Tasic, and M. Ye, *The Evolution of Competition in Local Broadcast Television Advertising and the Implications for Antitrust and Competition Policy*, at 2-3, 9-10 (Oct. 2020) (NERA Study), attached to *Ex Parte* Letter from M. Delrahim, Assistant Attorney General, Dept. of Justice (DOJ), Antitrust Division, to FCC, MB Docket No. 18-349 (Jan. 6, 2021) (discussing earlier empirical studies raising significant questions about whether local broadcast TV is a distinct advertising market and conducting new empirical analyses showing that advertising on digital platforms is a substitute for local broadcast TV advertising).

[87] *See*, *e.g.*, Supplemental Joint Comments Exhibit A, at 1, Statement of Larry Rosin, President, Edison Research and attached Powerpoint slides (showing notable correspondence between the rise in daily time spent listening to audio streaming services and the drop in time spent listening to OTA radio from 2014-2021, especially among younger audiences); *accord* 2019 Joint Comments at Exhibit A, Statistical Data from Edison Research. *See also* NAB Supplemental Reply Comments at 64 and n. 187; NAB Supplemental Comments at 72-75 and Attachment F (similarly discussing the rise and fall of audio streaming and OTA radio listening over time, citing Edison Share of Ear and Nielsen data); BIA Radio Study at 3-9.

[88] ASCAP's Response to the DOJ's June 5, 2019 Request for Public Comments Concerning the ASCAP and BMI Consent Decrees, at 12-13 (Aug. 9, 2019) (stating that traditional TV and AM/FM radio stations first faced new competition from cable/satellite TV and satellite radio, but "today, digital streaming services eclipse all of these offerings").

[89] *PwC Global Entertainment & Media Outlook 2021-2025*, *Power shifts: Altering the dynamics of the E&M industry*, at ii, 2, 5 (2021) (stating that the pandemic accelerated the "digital disruption" of the media and entertainment industries by, *inter alia*, rapidly increasing adoption of e-commerce, thereby buoying internet advertising, and providing further momentum to the "relentless" rise of streaming and the growing influence of gaming).

competition broadcasters face from other outlets, especially digital.[90] But they nevertheless insist that the market for purposes of this quadrennial review should remain limited to local broadcast radio stations.[91] The Commission should reject these parties' efforts to deny the reality of today's media and advertising markets, including the claim that, despite reams of evidence to the contrary, nonbroadcast content and advertising outlets are not really competitive substitutes for broadcast stations.[92]

As an initial matter, commenters insisting that audiences and advertisers do not substitute nonbroadcast outlets for broadcast radio (or TV) stations have no real explanation (or offer any empirical evidence providing an explanation) for stations' undisputed declines in audience levels and drops in ad revenues.[93] Only competition from and substitution by nonbroadcast outlets, especially digital, can account for broadcast stations' challenges in retaining audiences and ad revenues. One cannot dismiss as a mere coincidence that broadcast stations lost audiences, advertising revenues, and ad market share virtually in lockstep with the shift in audiences to other content platforms, especially streaming, and the rapid growth of online and mobile advertising platforms. The only rational explanation is that terrestrial radio stations compete in a broader advertising market including digital platforms, and in an audio marketplace including other content providers, especially online and satellite, whose strong competitive presence diminishes radio stations' share of the relevant markets.[94] One commenter now arguing that the relevant market for evaluating the local radio ownership rule is the local broadcast radio market[95] contrarily (and correctly) recognized in previous quadrennial reviews that terrestrial radio stations compete with their "local peers" and a "growing panoply" of competitors "at the local, regional, and global levels" (including specifically "satellite radio and internet-based services") and stated that these competitors' presence "reduces radio broadcasters' share of the market."[96]

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[90] *See*, *e.g.*, iHeart Supplemental Reply Comments at 10 ("There is no argument among radio broadcasters that local stations face daunting competitive challenges from digital media.").

[91] *See* iHeart Supplemental Comments at 9-10; iHeart Supplemental Reply Comments at 6-7; Coalition Reply Comments at 12.

[92] Similar claims made by some parties in 2019 were refuted by commenters at that time. *See*, *e.g.*, 2019 Joint Reply Comments at 3-9; NAB 2019 Reply Comments at 30-44; Joint Reply Comments of 25 Broadcast Licensees at 6-15.

[93] *See, e.g.,* Supplemental Joint Reply Comments at 5-7 (pointing out the lack of empirical evidence to support claims that broadcast radio and digital outlets do not compete in the same market and discussing evidence to the contrary).

[94] *See id.* at 5-6; NAB Supplemental Reply Comments at 68-69.

[95] iHeart Supplemental Comments at 9.

[96] Clear Channel 2010 Quadrennial Comments at 7. *See also id*. at 9 (stating that consumers today can "choose among a wide variety of unregulated sources of news, information, and entertainment that directly compete with broadcast radio" and that '[i]nternet-based audio

Other arguments attempting to explain why nonbroadcast audio services should not be regarded as part of the relevant market for this review of the FCC's local radio rules fail. Claiming that broadcast radio is unique or nonsubstitutable because it is free is simply erroneous.[97] As commenters correctly observed in 2019, consumers have "access to a multitude of free sources of audio content, including Pandora, GooglePlay, YouTube, and podcasts."[98] The fact that consumers need a digital device to listen to online audio does not mean that online audio content is somehow inaccessible or nonsubstitutable for broadcast radio, given the ubiquity of smartphones and the rapidly growing ownership of other digital devices such as smart speakers.[99] It is more likely to find a smartphone in a consumer's home than a traditional radio,[100] and smartphones lead the list of devices used for music listening.[101] Because audiences can easily find multiple free streaming services (with recommendations for the best ones)[102] and thousands of podcasts, the free nature of broadcast radio does not make it nonsubstitutable by other services.

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platforms" have become "full-fledged competitors of terrestrial radio broadcasters"); *id*. at 32-33 (stating that "[r]adio broadcasters operate in a marketplace where a satellite radio competitor offers 300 channels of audio into even the smallest market, where thousands of audio offerings are downloaded and heard on demand by users of iPods, PMPs, iPhones and smartphones, and where internet streaming of countless more (and customizable) offerings is strongly challenging terrestrial radio for listeners' ears"); *id*. at 36 (explaining that the "continued erosion of terrestrial radio listenership by new platforms" has "resulted in decreased advertising revenues"). Despite the marketplace becoming only more competitive in the last decade, no explanation was offered for this altered view of the relevant market.

[97] iHeart Supplemental Comments at 9; *see* 2018 NPRM, 33 FCC Rcd at 12121 (inquiring whether radio's free availability made it unique or nonsubstitutable).

[98] Joint Reply Comments of 25 Broadcast Licensees at 7-8.

[99] *See* NAB Supplemental Comments at 69-70 (reporting Edison Research and Pew Research Center data that in 2021, 88 percent of the total U.S. population ages 12+ owned smartphones, with 96 percent of adults ages 18-29 and 95 percent of those ages 30-49 owning smartphones).

[100] 2019 Joint Reply Comments at 6 and Exhibits A and B. *See also* NAB Supplemental Comments at 70 (citing Edison Research data on declines in the number of homes with AM/FM radios, especially among younger households).

[101] Nielsen Music and MRC Data, *US Music 360*, at 44 (2020). *See also* NAB Supplemental Comments at 70-71 (discussing how changes in technology and ownership of technology have fundamentally altered the public's audio and video consumption habits, and reporting Nielsen data showing that, among U.S. adults 18+, apps/web on a smartphone nearly have the weekly reach of radio and exceed the reach of linear TV across demographic groups).

[102] *See*, *e.g*., J. Wilson and G. Zamora, *The Best Free Online Streaming Music Services for 2022*, pcmag.com (Dec. 1, 2021).

Nor can commenters justify the exclusion of all platforms except terrestrial radio stations from the FCC's competitive analysis required by Section 202(h) by merely repeating the word "local" over and over again.[103] From a consumer's point of view, the most salient point about an audio (or video) content provider is whether the consumer can listen to or view it while in his or her local community. Consumers may not know or care where SiriusXM/Pandora, Spotify, Apple Music, or YouTube (or any digital video providers) are located, but they know that these sources are available in their homes, cars, and offices and on-the-go via multiple devices. While the FCC has a stated goal of fostering broadcast programming tailored to the needs and interests of local markets, this goal must account for the reality that tailoring now occurs on a consumer-specific, rather than a market, basis. Local audiences are no longer limited by technology to only geographically proximate radio (or TV) stations. Instead, they use a virtually infinite number of "stations" and outlets offering content tailored to their specific interests.[104] Digital audio (and video) outlets and services directly compete with broadcasters that provide service in specific geographic areas by offering content attracting local audiences in local markets across the U.S.[105]

The Commission should stop ignoring the intense competition radio (and TV) stations face by dismissing the many non-broadcast participants in the media marketplace as insufficiently "local." This position makes no sense. The local or non-local character of the content on other outlets is irrelevant to the competitive impact on local broadcast stations, which is factually indisputable and the key issue under Section 202(h). These myriad competing outlets – whether free or subscription and whether their content is local, regional, national, or even international – impact radio (and TV) stations in the same way: they divert audiences and advertising revenues away from local stations, thereby making it more difficult for stations to continue competing successfully and serving their local communities

[103] *See, e.g.,* Coalition Reply Comments at 9-12.

[104] The Coalitions indicated that this greater customization afforded by digital music platforms makes them distinguishable from broadcast radio. Coalition Reply Comments at 13. In fact, this feature of digital music platforms, which millions of consumers evidently value, makes them more competitive with broadcast radio stations and means online music services should be regarded as part of the relevant competitive market to determine the necessity of the local radio rule under Section 202(h).

[105] *See* NAB 2019 Comments at 19-20. Other commenters similarly explained that while satellite radio providers and online providers of audio content may not have a local physical presence in a market, that does not mean they are not competing vigorously for local audiences. The physical location from which content is delivered is irrelevant to the competitive impact, and to consumers, services are "local" if they can listen to them in their local area. Joint Reply Comments of 25 Broadcast Licensees at 8.

effectively.[106] Ironically, while professing to value locally-oriented broadcast programming and services, commenters such as the Coalitions, as well as the Commission, have consistently refused to recognize the very competition that endangers local stations' ability to provide such services on the grounds that those competitors do not offer locally-based service. The logic of this position escapes NAB.

In short, the Commission cannot continue to fixate on the nonlocal nature or other supposedly distinguishing features of nonbroadcast audio (and video) outlets as an excuse to banish them from the market relevant to its review its ownership rules or to justify retention of the current rules. Even if nonbroadcast platforms and their services are not identical to, or complete substitutes for, broadcast stations and their services, the FCC cannot pretend that these outlets have no competitive effect on local stations' ad revenues and audiences. As NAB explained previously, local stations would experience serious financial stress even if, for example, advertisers substituted other outlets for "only" 10, 15, 20, or 25 percent of their previous radio ad spending.[107] Certainly Section 202(h) requires the Commission to reform its ownership rules "as the result of competition" before the competitive position of radio (or TV) stations becomes too dire and before they become economically unable to serve their audiences in communities of all sizes.[108]

B. The Record Does Not Support Retention of a Market Definition From an Era When Radio and TV Stations Were the Only Electronic Media

Unable to cite evidence from the 2018 quadrennial's record to support its contention that the Commission should limit its competition analysis only to local broadcast radio, one commenter relies on the antitrust complaints brought against Facebook and Google, which assert that display and search advertising are distinct from each other and from offline advertising, such as radio, TV, and print.[109] As shown in detail below, two pending complaints brought by other agencies under different governing statutes provide no sound basis for the Commission to conclude on the record here – and contrary to the FCC's reports to Congress

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[106] The impact on local stations' ad revenues may be direct, in the case of competing ad-supported outlets, or indirect, in the case of competing subscription outlets that divert audiences and thus reduce the ability of local stations to generate ad revenues.

[107] NAB 2019 Comments at 28. Radio stations in mid-sized and smaller markets in particular earn limited levels of advertising revenue, have compressed profit margins, and have little or no financial cushion. Any negative impact on their revenues, even a minor one, could have serious negative implications on their financial viability. *Id*.; BIA Radio Study at 14.

[108] *See*, *e.g*., H.R. Rep. No. 104-204, at 48 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 11 (stating that the 1996 Act's broadcast provisions were intended "to preserve and to promote the competitiveness of over-the-air broadcast stations").

[109] iHeart Supplemental Comments at 9-11 (quoting complaints and asserting that the relevant market for determining whether to retain, modify, or repeal the local radio rule is the local broadcast radio market); *accord* iHeart Supplemental Reply Comments at 6-7.

on competition in the communications marketplace – that broadcast radio stations only compete with other radio stations and broadcast TV stations only compete with other TV stations for purposes of this quadrennial review.

When addressing broadcast ownership questions through their review of proposed mergers of radio and TV station groups, the DOJ traditionally has focused on the effects of such combinations on advertisers (the "consumers" of broadcast advertising) and the price of advertising.[110] But the Communications Act and Section 202(h) of the 1996 Act do not replicate the antitrust statutes.

As NAB explained last fall, the FCC should focus here on competitive viability of local stations and their consequent capability to offer the programming and services, including local journalism, upon which audiences rely.[111] NAB discussed how this focus comports with congressional intent in the 1934 Act and other major legislation, including the 1996 Act, and promotes the FCC's public interest goals.[112] To fulfill Congress's vision, the FCC must ensure that its broadcast ownership and other rules enable radio and TV stations to serve the public interest and their communities of license, which means that the broadcast industry must remain economically viable in a changing and highly competitive marketplace.[113]

More specifically, Section 202(h) requiring the FCC to repeal or modify any ownership rules no longer necessary in the public interest as the result of competition plays a key role in Congress's plan in the 1996 Act for it and the Commission to "reform Federal policy and the current regulatory framework to reflect the new marketplace realities" and ensure the broadcast industry's ability to "compete effectively in a multichannel media market."[114] The FCC's obligations under Section 202(h), which governs this proceeding, thus differ from the antitrust agencies' duties under the antitrust statutes. Section 202(h) directs the FCC to determine periodically the continuing competitive need for its specific structural rules that prohibit *in advance* any broadcast combinations resulting in the ownership of more than a

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[110] *See* NERA Study at 4-7 (discussing DOJ's traditional approach to analyzing competition for advertising in broadcast mergers and describing the "SSNIP" test, asking whether a small but significant and non-transitory increase in price could be imposed).

[111] NAB Supplemental Comments at 6-9.

[112] *Id*. (discussing the 1934 Act, the 1992 Cable Television Consumer Protection and Competition Act (Cable Act), the 1996 Act, and satellite TV legislation).

[113] *Id*.

[114] H.R. Rep. No. 104-204, at 55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 19. In neither the statute nor the conference report did Congress indicate it intended Section 202(h)'s required competition analysis to be limited only to competition from local broadcast outlets. In enacting the 1996 Act, Congress clearly did not believe the additional competition facing broadcasters even in the analog era was restricted just to the growing numbers of broadcast outlets. *Id*. (noting the emergence and growth of nonbroadcast competitors).

certain number of stations, regardless of their audience or advertising shares in local markets. The DOJ has no such structural rules and no comparable statutory obligation.[115]

While DOJ focuses on the potential impact of specific proposed broadcast mergers on competitive prices for advertisers, the FCC addresses a broader conception of competition under Section 202(h) and the Communications Act – the competitive viability of broadcast stations in a changing marketplace and their ability to successfully compete for the audiences and ad revenues necessary to support non-subscription services in local communities of all sizes. The Commission therefore should not reflexively analyze competition in the same way as the antitrust authorities or automatically utilize the broadcast-only market definition traditionally used by DOJ to analyze broadcast mergers (even assuming that such a narrow market definition remains valid for purposes of antitrust law, which NAB and others strongly dispute).

As NAB has long made clear, and as the record here demonstrates, the DOJ's traditional analysis of the relevant advertising market for evaluating broadcast mergers is woefully outdated, and limiting the relevant market to only broadcast stations is a holdover from an anachronistic assessment of media and ad market dynamics.[116] A correctly modernized market definition would reflect the unprecedented levels of competition for both audiences and ad dollars from broadcast and nonbroadcast sources.[117] Congress also has long understood that broadcast stations compete with multichannel outlets for advertisers, as

[115] *See* Supplemental Joint Reply Comments at 7 n. 14 (urging FCC to reject arguments that it should rely on market definitions in recent antitrust complaints in the context of this quadrennial review, and stating that how DOJ seeks to enforce antitrust law has "no bearing" on the FCC's § 202(h) mandate to evaluate whether the local radio rule remains necessary).

[116] For example, the DOJ, in limiting its market definition to only broadcast TV stations when reviewing mergers of TV station groups, has for years asserted that "[b]roadcast television spot advertising combines sight, sound, and motion in a way that makes television advertisements particularly memorable and impactful." Competitive Impact Statement, at 8, *U.S. v. Gray Television, Inc. and Raycom Media, Inc.*, No. 1:18-cv-02951 (D.D.C. Dec. 14, 2018). As long ago as 1957, FCC staff similarly posited in a report that national TV advertising was "sufficiently distinctive to warrant special treatment as a market," focusing on the fact that among national advertising mediums, television was "the only one which makes it possible to convey the advertising message through a combination of sight, sound, and motion." FCC, Network Broadcasting, Report of the Network Study Staff to the Network Study Committee, at 175 (1957). NAB suggests that findings about advertising competition from 65 years ago should be retired or at least critically reexamined.

[117] *See, e.g.*, Section III.A., *supra*; NAB Supplemental Comments at 55-98; NAB Supplemental Reply Comments at 63-65, 68-69; NAB 2019 Comments at 7-28, 44-57; NAB 2019 Reply Comments at 30-45, 56-64.

well as audiences,[118] and more recently, Congress and the Biden Administration recognized the very harmful impacts that the internet platforms' dominance, including in the advertising market, has had on local media outlets, including newspapers and broadcast stations.[119]

Indeed, given the current state of the newspaper industry, it defies common sense to assert that "online" and "offline" advertising are in separate markets and do not compete with one another. There appears to be no dispute that the closure of so many newspapers and the loss of thousands of newsroom employees has resulted from the collapse of newspapers' advertising revenues due to competition by online platforms and their rise to dominate advertising in the U.S.[120] How, then, can "online" and "offline" advertising be distinct,

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[118] In Sections 2(a)(13)-(14) of the Cable Act, for example, Congress found that "[a]s a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services," and that "[c]able television systems and broadcast television stations increasingly compete" for ad revenues. 47 U.S.C. § 521 nt. And Congress in the 1996 Act recognized that broadcasters compete with multichannel providers, necessitating an overhaul in the FCC's ownership regulatory framework. *See* H.R. Rep. No. 104-204, at 54-55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 18-19.

[119] Congress has identified the dominant and monopolistic power of platforms such as Google and Facebook, and their unfair and anticompetitive treatment of local media outlets, as a primary cause of the decline of local journalism. News Release, *Senator Klobuchar and Representative Cicilline Introduce Legislation to Protect Journalism in the United States* (Mar. 10, 2021) (along with co-sponsors, announcing introduction of bill to allow news publishers to collectively negotiate with digital platforms). *See also* NAB Supplemental Comments at 20-24 and Attachments A & B (explaining that the tech platforms' rise to dominate both content discovery and digital advertising has decimated the newspaper industry and is imperiling the ability of broadcast stations to reach online audiences and to derive ad revenues from that content). President Biden's Executive Order on promoting economic competition also expressly recognized the harmful effects the large internet platforms' "dominance in advertising markets" has had on local newspapers. *Executive Order on Promoting Competition in the American Economy*, at Section 1 (July 9, 2021).

[120] *See*, *e.g*., Steven Waldman and the Working Group on Information Needs of Communities, FCC, *The Information Needs of Communities: The changing media landscape in a broadband age*, at 39-42 (July 2011) (reporting that as early as 2005, the internet had begun seriously undercutting newspaper revenue, with total newspaper print advertising revenue plummeting more than 50 percent between 2000-2010, and including a list of closed newspapers and statistics about declines in newsroom staffing); D. Sherer and C. Cho, *Stop the Presses? Newspapers in the Digital Age*, Congressional Research Service, at 5-6 (Jan. 27, 2022) (explaining that "[t]he internet transformed the local advertising market for newspapers, unleashing competition from online platforms and websites" and that "as of 2019, Google and Facebook collectively received 77% of online advertising revenue in local markets," ultimately contributing "to the closure of hundreds of newspapers and reductions in publication frequencies for others, and/or staff layoffs"); C. Hendrickson, *Local Journalism in*

separate, and non-substitutable? Any party insisting that is the case must be prepared to explain how the tech platforms dominating the ad market managed to cripple the newspaper industry financially without actually competing against newspapers for advertising revenues.

As discussed in Section III.A., economic studies, moreover, have shown that broadcast stations compete with traditional media outlets and digital platforms for advertising dollars. The most notable study submitted in this proceeding found "substantial contextual evidence that digital advertising delivered over both fixed and mobile broadband networks constitutes a direct substitute for local broadcast advertising, adding to existing competition from cable TV (which competes directly with broadcast for local advertising dollars) and other media."[121] This recent study by NERA also conducted a new empirical analysis to assess the growing impact of online advertising, finding "strong support for the proposition that advertisers now view advertising on digital platforms as a substitute for local television advertising," and concluding that the "cumulation of competitive alternatives, now including digital," prevents TV broadcasters from raising advertising prices even in circumstances where competition from other local broadcasters appears to decrease.[122] Notably, the DOJ Antitrust Division, via a letter by then-Assistant Attorney General Makan Delrahim, submitted the NERA Study into the record for the FCC's consideration in this quadrennial review. [123] Despite the DOJ's action, commenters in this proceeding generally ignored this significant study and none have attempted to challenge its specific analyses or conclusions.

Crisis: Why America Must Revive its Local Newsrooms, Brookings, at 10-11 (Nov. 12, 2019) (stating that Facebook and Google "dominate the market . . . [w]hile the two companies account for 58% of digital advertising revenue nationally, in local markets, the two companies account for 77% of digital advertising revenue, a serious squeeze for local news publishers."); N. Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 Harv. J. Law & Tech. 473, 480-481 (2021) (reporting that Google and Facebook have "devoured" newspapers' advertising revenues, with revenue plummeting 72 percent between 2005 and 2018 as Google and Facebook rose); *Local Journalism: America's Most Trusted News Sources Threatened*, U.S. Senate Committee on Commerce, Science, and Transportation, at 14-15 (Oct. 2020) (explaining how online advertising crippled news publishers' advertising revenues); *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, at 57 (2020) (reporting that since 2006, the news industry has been in "economic freefall, primarily due to a massive decrease in advertising revenue. Both print and broadcast news organizations rely heavily on advertising revenue to support their operations, and as the market has shifted to digital platforms, news organizations have seen the value of their advertising space plummet steeply.").

[121] NERA Study at 2.

[122] *Id*. at 3. *See also* NAB Supplemental Comments at 55-59 (discussing the NERA Study and its implications for the FCC's ownership rules in greater detail).

[123] *Ex Parte* Letter from Makan Delrahim, Assistant Attorney General, DOJ, Antitrust Division, to FCC, MB Docket No. 18-349 (Jan. 6, 2021).

For all these reasons, the Commission should not in this proceeding governed by Section 202(h) apply the outdated and overly restrictive advertising market definition that the DOJ has traditionally applied in reviewing broadcast mergers under the antitrust statutes. The current record fully justifies the Commission modernizing its definition of the relevant markets for purposes of reviewing the structural ownership rules to match its definitions of the audio and video markets in its mandated reports to Congress on competition in the communications marketplace. Under such updated market definitions, the FCC cannot rationally retain its current local ownership restrictions.

NAB observes, however, that even if the Commission were to erroneously conclude that the existing record does not warrant updating its definition of the relevant markets for this quadrennial review, such a conclusion would *not* justify ignoring the increased competition radio and TV broadcasters face from many other audio and video content providers and advertising platforms. In its 2017 ownership order upheld by the Supreme Court last April, the Commission declined on the then-current record to expand the relevant market for the purpose of the local TV ownership rule (although noting that its conclusion not to include other types of video programming providers within the market "could change in a future proceeding with a different record").[124] The Commission nonetheless stressed that its conclusion did "not mean" that "changes outside the local broadcast television market should not factor into the Commission's assessment of the rule under Section 202(h) or that the Commission is free to retain its existing rule without any adjustments that take into account marketplace changes."[125] Indeed, the Commission found that broadcasters' "important role" made it critical for the FCC to "ensure that its rules do not unnecessarily restrict their ability to serve their local markets" in the face of ever-growing program options.[126] Accordingly, the Commission took particular account of consumers' increasing use of non-broadcast options and determined to relax the local TV rule to help local broadcasters "achieve economies of scale and improve their ability to serve their local markets" in an evolving marketplace.[127]

It therefore would be contrary to its own precedent and understanding of Section 202(h), as well as arbitrary and capricious, for the Commission here to ignore marketplace changes and the rapid growth in and consumer usage of nonbroadcast audio and video options in retaining the current local ownership rules, even under an inappropriately narrow and antiquated definition of the relevant market.

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[124] 2017 Reconsideration Order, 32 FCC Rcd at 9833.

[125] *Id*. at 9833-9834.

[126] *Id*. at 9834.

[127] *Id*. at 9834-9835 (eliminating the eight-voices test from the local TV rule).

IV. Certain Parties Opposed to Updating the Local Radio Rules Have Mischaracterized the Broad Level of Support for Reform and Resorted to Claiming that Relaxing Asymmetric Ownership Restrictions Would Not Help Radio Broadcasters Anyway

A. Broadcasters Large and Small Alike Support Relaxation of the Local Radio Caps

A few commenters erroneously contended that only a limited number of larger radio groups support NAB's proposal for reforming the local radio rule and that smaller broadcasters and independent operators oppose relaxation of the 1996 caps.[128] Even a cursory examination of the record in this proceeding demonstrates the inaccuracy of these claims.

In fact, in 2018 and 2019 radio broadcasters of all sizes and located in all sized markets – including dozens of mid-sized and small station groups – supported NAB's proposal for reforming the local radio rule, with some also urging the FCC to go further and eliminate the rule.[129] Broadcasters with stations in mid-sized, small, and unrated markets moreover

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[128] *See* Salem Supplemental Reply Comments at 3; Coalition Reply Comments at 11; *see also* Comments of musicFIRST Coalition and Future of Music Coalition, GN Docket No. 20-60, at 5-8, 17 (Apr. 27, 2020) (Coalition Communications Marketplace Comments) (claiming that small and "independent" radio broadcasters oppose reform of the local radio limits).

[129] *See* Joint Reply Comments of 25 Broadcast Licensees at 2; Joint Comments of Connoisseur Media, LLC, Mid-West Family Broadcasting, Frandsen Family Stations, Neuhoff Commc'n, Patrick Commc'n, LLC, Townsquare Media, Inc., Midwest Commc'n, Inc., Cherry Creek Media, Eagle Commc'n, Inc., Legend Commc'n, LLC (collectively, Ten Joint Commenters), MB Docket No. 18-349, at 26 (Apr. 29, 2019) (2019 Joint Comments); 2019 Joint Reply Comments at 2, 14; Reply Comments of WBOC, Inc., MB Docket No. 18-349, at 1, 3 (May 29, 2019) (WBOC Reply Comments); Reply Comments of Grant Co. Broadcasters, MB Docket No. 18-349, at 1, 3 (May 13, 2019) (Grant Reply Comments); Comments of Reno Media Group, MB Docket No. 18-349, at 3 (Apr. 29, 2019); Comments of Alpha Media LLC, MB Docket No. 18-349, at 1 (Apr. 29, 2019) (Alpha Media 2019 Comments); Comments of Vanguard Media, MB Docket No. 18-349, at 2 (Apr. 29, 2019); Comments of Galaxy Commc'n LLC, MB Docket No. 18-349, at 2-3 (Apr. 29, 2019) (Galaxy Commc'n Comments); Comments of West Virginia Radio Corp., MB Docket No. 18-349, at 2, 6 (Apr. 15, 2019) (West Virginia Radio Comments); Comments of Dick Broadcasting Co., Inc., MB Docket No. 18-349, at 1, 3 (Apr. 9, 2019) (Dick Broadcasting Comments); Letter from John Zimmer, President, Zimmer Radio & Marketing Group, to Marlene H. Dortch, FCC, MB Docket No. 18-349, at 1 (Aug. 1, 2019) (Zimmer Radio *Ex Parte*); Comments of Radio Fargo-Moorhead, Inc., MB Docket No. 18-349 at 1, 5 (Sept. 11, 2019) (Radio Fargo-Moorhead Comments); Comments of Sun Broadcasting, Inc. and WBOC, Inc., MB Docket Nos. 18-227 & 18-349, at 5-6 (Sept. 24, 2018); Letter from Raul Santiago Santos, President, Puerto Rico Radio Broad. Ass'n, to Michelle Carey, FCC, MB Docket No. 18-349, at 1 (Aug. 15, 2018). Other small broadcasters called upon the FCC to reform the local rules in different ways. *See* Letter from Aaron J. Leiker, President and General Manager 25-7 Media, Inc. to FCC, MB Docket No. 18-

agreed with NAB's analysis of the economics of radio broadcasting in smaller markets.[130] Many small broadcasters – beyond supporting reform of the rules – described the difficult competitive landscape in their specific markets under the current ownership caps.[131]

In 2021, a number of radio broadcasters, most of whom were small or mid-sized owners, again supported NAB's proposal for ownership reform or called for elimination of all local radio limits. For example, Golden Isles Broadcasting, which owns just three FM stations in one of the smallest ranked radio markets (Brunswick, GA), endorsed the proposals of NAB

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349 (Apr. 30, 2019) (25-7 Media *Ex Parte*) (urging FCC to "remove ownership restrictions on small, unrated markets"); Comments of Curtis Media Group, Inc., MB Docket No. 18-349, at 2-3 (Apr. 29, 2019) (calling for elimination of AM ownership limits and supporting removal of FM subcaps while retaining the current market size tiers and overall limits so that, *e.g.*, in the top tier with 45+ stations, ownership of up to eight FM stations would be permitted).

[130] *See, e.g.,* Joint Reply Comments of 25 Broadcast Licensees at 14-15 & Attachment B at 3 (updated BIA analysis of the Syracuse, NY advertising market finding that the "competitive impact of new media technologies" is "especially acute in medium and small markets").

[131] *See, e.g.*, 25-7 Media *Ex Parte* (describing difficulties of maintaining radio stations' financial viability in a small Colorado town); WBOC Reply Comments at 1-3 (licensee of four FM and one AM stations in Delmarva peninsula explaining that the "economics of small-market broadcasting" and growing competition make it "harder and harder to operate without achieving significant local scale"); Radio Fargo-Moorhead Comments at 2-4 (explaining that competitive trends in the advertising market "are most sharply felt by smaller, local broadcasters," and documenting that digital media accounts for the majority of local ad spend in Fargo-Moorhead, ND); West Virginia Radio Comments at 5-6 (agreeing with NAB that permitting greater economies of scale is very important for smaller broadcasters earning limited revenues and urging FCC to adopt NAB's proposal to remove all ownership limits in markets outside the top 75, especially in smaller and undefined markets such as those in West Virginia); Zimmer Radio *Ex Parte* at 1-2 (licensee of ten radio stations in mid-Missouri explaining importance of achieving greater economies of scale to survive in increasingly competitive market); Dick Broadcasting Comments at 1-2 (operator of stations in small and mid-sized markets in North Carolina, South Carolina and Georgia describing the problems experienced by broadcasters in smaller markets with fewer potential advertisers and limited revenues in hiring talented staff, providing strong programming, and competing against other outlets for audiences); Grant Reply Comments at 1-2 (independent broadcaster with FM stations in Kentucky and Ohio discussing the difficulties in obtaining funding for small radio station transactions); Decl. of Susan Patrick, Legend Communications of WY, LLC at 1-2, Exh. C attached to 2019 Joint Comments (detailing loss of ad revenue in small markets and describing how some radio operations in Wyoming "are barely staying on the air, much less providing robust service and programming to their communities").

and other commenters “to relax or eliminate” outdated radio ownership restrictions.[132] Similarly, Summit Media and Alpha Media requested the Commission to eliminate the local radio rule in its entirety or, at a minimum, adopt NAB’s proposal for reforming the rule.[133] And the Ten Joint Commenters – nine of which are small or mid-sized radio groups – again submitted extensive information and data to support their calls for significantly relaxing or eliminating the local radio ownership limits.[134] Claims that only some larger radio broadcasters support significant reform of the ownership limits generally or NAB’s proposal specifically have no basis in reality.

B. Reforming the Radio Ownership Rules as NAB Proposes Will Enhance the Competitive Position and Financial Viability of Local Broadcasters

Apparently unable to find convincing competitive grounds for retaining antiquated and asymmetric limits on terrestrial radio stations, certain commenters opposing reform of the local radio rule, particularly for FM, have repeated arguments that the Commission should not update its rule because doing so would not help the radio industry better compete for advertising anyway.[135] These repetitive claims fail for various reasons, including inconsistency with Section 202(h), this proceeding’s record, and common sense.

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[132] Reply Comments of Golden Isles Broad., LLC, MB Docket No. 18-349, at 2 (Oct. 1, 2021) (Golden Isle Reply Comments) (urging FCC to recognize that radio is now “one small cog” in a massive audio ecosystem). Clearly, many small broadcasters do not agree with the Coalitions that ownership caps “protect” smaller FM broadcasters. Coalition Reply Comments at 16.

[133] Reply Comments of Summit Media, LLC, MB Docket No. 18-349, at 2-3, 5 (Sept. 30, 2021) (Summit Reply Comments) (stating that the local radio rule no longer promotes competition among radio stations but hinders radio stations trying to compete in the modern multimedia marketplace); Reply Comments of Alpha Media USA LLC, MB Docket No. 18-349, at 2-3, 7 (Oct. 1, 2021) (Alpha Media Reply Comments) (explaining that while the radio industry was hit hard by the pandemic, the more significant trend is the continued erosion of local radio’s audiences and revenues by digital media).

[134] Supplemental Joint Comments at 29; Supplemental Joint Reply Comments at 2. Yet another very small radio operator suggested several other approaches to the FCC for updating its regulatory framework, especially for Class A FM broadcasters. *See* Comments of Press Communications, LLC, MB Docket No. 18-349, at 4-5 (Aug. 30, 2021).

[135] *See* iHeart Supplemental Reply Comments at 10-11; Salem Supplemental Reply Comments at 3-4; Comments of Nat’l Ass’n of Black Owned Broadcasters, Inc. (NABOB), MB Docket No. 18-349, at 14-15 (Sept. 1, 2021) (NABOB 2021 Comments); Coalition 2019 Comments at 10-11; Reply Comments of iHeart Communications, Inc., MB Docket No. 18-349, at 19-21 (May 29, 2019) (iHeart 2019 Reply Comments). *But see* Clear Channel 2010 Quadrennial Comments at 4, 32-33, 37 (calling on FCC to repeal the local radio rule or, at the least, permit higher levels of common ownership in markets with more than 55 stations and eliminate the “anachronistic” AM/FM subcaps).

To begin, some commenters' opinions that the local radio rule should not be reformed because such action would not help the radio industry compete more effectively in the modern audio marketplace, especially against large digital platforms, mistake the FCC's statutory obligations and the competitive question Section 202(h) requires it to answer. The Commission has a duty to determine whether its ownership rules remain necessary in the public interest as the result of competition and to repeal or modify those that are not. NAB, the Ten Joint Commenters, and dozens of other broadcasters have shown that the analog-era radio limits are no longer necessary to promote competition in today's fiercely competitive media and advertising markets. Nor are those limits needed to ensure that consumers can enjoy a wide and diverse – indeed, an almost limitless – range of competing audio (and video) options and content available via a plethora of devices. Section 202(h) therefore requires the Commission to repeal or relax the competitively unnecessary local radio caps. The fact that a small number of commenters claim that reforming the ownership limits ultimately will not help the radio industry nearly as much as most other parties insist does not alter the FCC's statutory mandate to repeal or modify competitively unnecessary rules. And, as discussed in detail below, assertions that reforming or removing the current ownership caps (at least for FM stations) will not enhance local broadcasters' financial and competitive viability are illogical, factually unsupported, and contrary to record evidence.

1. Eliminating or Relaxing Asymmetric Ownership Rules Will Improve Radio Broadcasters' Competitiveness by Enabling Them to Achieve Vital Economies of Scale, Especially in Smaller Markets

As NAB discussed previously, numerous studies have shown that retaining asymmetric legacy regulations in an era of increased competition creates regulatory distortions and places the more heavily regulated companies or industry sectors at a competitive disadvantage relative to companies and sectors that provide similar services but are not subject to regulatory burdens and constraints.[136] Thus, claims that removing or loosening ownership restrictions imposed on radio and TV stations (but on none of their competitors) would not improve broadcasters' competitive position seems counterintuitive on its face and is contrary to current economic literature.

The position that reforming the FM ownership limits specifically will be ineffective in helping FM radio compete in today's audio marketplace is even more curious and unconvincing. For example, one party has contended that removing AM ownership limits would create greater opportunities for innovation and space for new business strategies that could stem AM stations' erosion of listening audience and advertising revenues.[137] If permitting broadcasters to own additional AM stations and achieve greater scale has those potential benefits, then logically the same benefits should flow from increased common ownership of FM stations. After all, economies of scale are, by definition, "associated with falling unit costs

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[136] NAB Supplemental Comments at 15-16 (citing studies).

[137] iHeart 2019 Comments at 27-28.

of production – that is, with the production of more output at lower average cost – and hence are *prima facie* welfare enhancing."[138]

Unsurprisingly, then, the record is replete with evidence documenting the need for, and the significant benefits of, reforming the ownership limits to allow broadcasters to achieve increased efficiencies and scale economies. Parties explained how owning a greater number of radio stations locally enables cost savings that will boost cash flow and permit greater investment in programming and services to the public.[139] They also emphasized that broadcasters in smaller markets with limited economic bases and ad revenue potential need to achieve local economies of scale,[140] especially given the struggles of many small market FM and AM stations to generate revenues sufficient to cover their substantial fixed costs, let alone invest in improving programming, staff, or technical facilities.[141] The math, after all, is simple. As one small radio broadcaster operating in smaller markets succinctly attested: "If we had access to more stations, we would be able to generate more revenue without increasing overhead," enabling "us to better serve our communities."[142]

The BIA Radio Study specifically demonstrated that increased economies of scale from relaxation of the current caps would improve the financial wherewithal of broadcasters and thus their ability to invest in their stations and services. As explained in NAB's comments,[143] BIA examined actual examples of radio station groups currently constrained by the FCC's caps in four different markets and analyzed the financial impact of their acquisition of an actual unconstrained station group in their same markets. To err on the conservative side,

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[138] J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1 (June 2011), attached to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011) (Economies of Scale Study).

[139] *See, e.g.,* Joint Reply Comments of 25 Broadcast Licensees at 16 (explaining that common ownership enables elimination of multiple studios and office space, the combination of transmission facilities at common sites, and consolidation of back office services, such as financial reporting, billing, and accounts payable); *accord* Radio Fargo-Moorhead Comments at 4; Summit Reply Comments at 4; BIA Radio Study at 27-28.

[140] *See, e.g.*, Joint Reply Comments of 25 Broadcast Licensees at 17; WBOC Reply Comments at 1-3; West Virginia Radio Comments at 5-6; Galaxy Commc'n Comments at 6; Radio Fargo-Moorhead Comments at 2-3.

[141] *See, e.g.*, NAB Supplemental Comments at 31-34, 78-81, and Attachment C; NAB 2019 Comments at 31-33; BIA Radio Study at 14, 31-35; Decl. of Michael Wright, Midwest Commc'n, Inc., at 5, Exh. C to 2019 Joint Comments (Wright Decl.) (radio broadcasters with greater scale "will be in a better position to run a business with a healthier bottom line that can be reinvested in people, content, and more localized activities").

[142] Decl. of M. Kent Frandsen, Frandsen Media Co., at 2, Exh. C to 2019 Joint Comments (Frandsen Decl.) (capitalization in heading omitted).

[143] NAB 2019 Comments at 37-38.

BIA deliberately did not assume any increase in revenue by the stations following their combination. Instead, BIA estimated the combinations' financial benefit by analyzing the increased efficiencies and decreased expenses due to economies of scale, and modeled the financial position of the stations before and after their combination to determine the effects on cash flows.[144] As summarized in the Study, and in the chart below, the station groups in these hypothetical transactions, which are not currently allowed but would be permitted under NAB's proposal, all benefitted from improved cash flow:

Summary of Cash Flow Benefits from Transactions Under Relaxed Ownership Rules

Market Sizes	Improvement in Cash Flow (000)	Percentage Increase in Cash Flow
Top Market	$2,006	6.0%
Large Market	$1,184	9.6%
Small Market	$306	13.8%
Very Small Market	$170	16.8%

As BIA explained, these results are not surprising, as such combinations would permit radio stations to spread their significant fixed costs across more stations with greater combined revenues.[145] Notably, the cash flow benefits of permitting additional station combinations are greatest in small markets, where radio stations most struggle to cover their fixed costs. Such increased cash flow would permit stations to invest in better programming, technological and other innovation, and data-driven sales operations, which, according to various parties, attracts advertisers and audiences.[146] Broadcasters also explained that regulatory relief and its resulting competitive benefits would help bring more investment capital to the radio industry and encourage lending to broadcasters.[147]

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[144] *See* BIA Radio Study at 26-31 (describing its analysis in more detail).

[145] BIA Radio Study at 30-31.

[146] *See, e.g.*, 2018 NPRM, 33 FCC Rcd at 12120, n.79 (quoting broadcaster letter "claiming that 'innovation, ideas, relationships, compelling programming and data solutions' are what attracts advertisers"); Grant Reply Comments at 1 (discussing the advertising market challenges of radio stations and explaining that a well-programmed product and a sales staff skilled at presenting the product are needed to attract advertisers); Dick Broadcasting Comments at 1 (noting that stations need the financial resources to pay for strong programming, including local news and sports, and qualified talent to attract listeners); NAB 2019 Comments at 35-36 (explaining that stations lacking the financial resources to make the programming, personnel, and technological investments that would attract larger audiences and generate more ad dollars have little hope of improving their competitive position, at least under the FCC's existing rules).

[147] *See, e.g.*, 2019 Joint Comments at 25; Grant Reply Comments at 2; Dick Broadcasting Comments at 2. *See also* NAB Supplemental Comments at 16 and n. 35 (citing economic

In sum, the BIA Radio Study confirmed the clear and substantial benefits resulting from increased economies of scale that earlier studies had similarly found in the TV industry.[148] The Commission should disregard one commenter's claims that the BIA Radio Study overstated the benefits of the efficiencies and cost savings that would flow from increased common ownership of stations by not accounting for the costs incurred in the acquisition of new stations.[149] While station acquisitions do entail costs, those costs are fixed and paid once. The efficiencies and cost savings identified by BIA are recurring annual savings in operations from which broadcasters would continue to reap benefits long after acquisition costs are paid. Assertions about acquisition costs do not cast doubt on ether the BIA Study's conclusions or other unrefuted record evidence showing the benefits of permitting greater scale economies in the broadcast industry.[150]

2. Adopting NAB's Proposal Will Enhance Local Stations' Ability to Garner Advertising Revenue

The Commission should reject a few parties' repetitive claims that it should dismiss NAB's reform proposal because broadcasters' acquisition of additional stations in local markets will not allow them "solve the Google, Facebook, Instagram, Snapchat problem"[151] or allow broadcasters "to take on Google or Facebook."[152] The 2018 opinion pieces containing these two quotes essentially represent the "evidence" repeatedly cited by commenters asserting that greater local scale will not enhance radio broadcasters' ability to compete for advertising

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analyses concluding that asymmetric regulation discourages investment in the more heavily regulated companies or sectors).

[148] *See* Economies of Scale Study at 1-2 (finding that TV broadcasting generally, and local news production specifically, are subject to economies of scale and scope and that regulations limiting the realization of such economies "result in higher costs, lower revenues, reduced returns on invested capital, lower output and, potentially, fewer firms); Decl. of M. Israel and A. Shampine, Comments of NAB, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014) (finding that economies of scale and scope exist in TV broadcasting and that both lead to "increased investment in news programming").

[149] iHeart 2019 Reply Comments at 23 (citing "legal fees, due diligence, and financing" and also stating that these costs "could include" others, such as relocation and moving expenses and facilities expansion/construction).

[150] The FCC has long recognized the benefits of scale economies in broadcasting. *See, e.g.*, 2017 Reconsideration Order, 32 FCC Rcd at 9834, 9836; 1992 Radio Ownership Order, 7 FCC Rcd at 2760-61; Report and Order, 14 FCC Rcd 12903, 12911 (1999).

[151] Eric Rhoads, *Radio's Weak Dereg Argument*, Radio Ink (Aug. 2, 2018) (Rhoads Article).

[152] Glenn Cherry and Ronald Gordon, *The Three Types of Radio Deregulation*, Radio World (July 25, 2018) (Cherry/Gordon Article).

in today's marketplace.[153] Not only do these parties denying the competitive benefits of increased common ownership lack convincing supporting evidence for their position, their response to NAB and numerous broadcasters ignored detailed evidence demonstrating the extensive economic benefits stemming from radio broadcasters achieving local scale. The "it won't solve the Google/Facebook problem so why bother" stance also trivializes the need of broadcasters, including the smallest with a mere handful of stations, to reach greater scale locally. Broadcasters such as Golden Isles, with three FM stations in Brunswick, Georgia, WBOC, Inc., with five radio stations in the Delmarva peninsula, Radio Fargo-Moorhead, with five stations in North Dakota, or Zimmer Radio with ten stations in mid-Missouri, have not deluded themselves into thinking that owning more stations in their local markets will allow them to beat Google or Facebook or solve all their competitive problems. But myriad broadcasters engaged in their local markets have attested, and NAB has shown, that greater local scale will increase stations' cash flow (as described above) and will enable them to compete more effectively for advertising, as discussed in detail below.

To begin, the record shows that permitting broadcasters to own additional stations in local markets will allow them to expand their audiences and, thus, increase their ad revenues. NAB and various broadcasters explained that owning more stations locally enables broadcasters to program each outlet differently to attract different audiences with differing tastes and interests.[154] This not only benefits the public by increasing the diversity of programming, but also benefits stations by increasing the size and variety of their audiences and their attractiveness to potential advertisers.[155]

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[153] *See* Coalition 2019 Comments at 11 (quoting both the Rhoads Article and the Cherry/Gordon Article); iHeart 2019 Reply Comments at 19-20 (quoting other commenters quoting these same two articles); Comments of NABOB, MB Docket No. 18-349, at 11 (Apr. 29, 2019) (NABOB 2019 Comments) (quoting Rhoads Article); NABOB 2021 Comments at 14 (quoting the same paragraph of the Rhoads Article again); Comments of MMTC, MB Docket No. 18-349, at 7-8 (Apr. 28, 2019) (quoting the same two articles).

[154] *See, e.g.*, NAB 2019 Comments at 38-39; NAB 2019 Reply Comments at 45-48 (identifying nine studies finding that increased common ownership in the radio industry starting in the 1990s resulted in greater programming diversity); 2019 Joint Comments at 22-23; Decl. of Jonathan Brewster, Cherry Creek Media at 2, Exh. C to 2019 Joint Comments (Brewster Decl.); Frandsen Decl. at 2; Decl. of Erik Hellum, Townsquare Media, Inc. at 3, Exh. C to 2019 Joint Comments (Hellum Decl.); Zimmer Radio *Ex Parte* at 1, 3; Joint Reply Comments of 25 Broadcast Licensees at 18. Broadcasters also discussed specific underserved audiences in their local markets and how greater scale would enable their station groups to offer more diverse programming to serve those audiences. *See, e.g.*, Decl. of Thomas Walker, Mid-West Family at 2-3, Exh. C to 2019 Joint Comments (Walker Decl.) (discussing South Bend/Elkhart, IN); Alpha Media Reply Comments at 5-6 (discussing Columbia, SC and Louisville, KY).

[155] *See, e.g.,* NAB 2019 Replies at 40-41; Alpha Media Reply Comments at 6; Wright Decl. at 3-5 (discussing benefits of deregulation in various-sized markets, including Sioux Falls, SD,

Appealing to more – and more varied – consumers will help stations compete for the mix of traditional and digital advertising spending by businesses. Borrell's 2018 and 2019 local advertiser surveys found that the vast majority of local businesses used a considerable range of advertising options, including both traditional and digital ad platforms,[156] and BIA's 2018 survey of advertisers similarly found that advertisers who reported using broadcast radio also utilized a wide range of other ad platforms, including both traditional and digital.[157] Among those advertisers that bought radio advertising in 2020, 96 percent of them also spent ad dollars on social media; 61 percent spent money on email marketing; 54 percent on newspaper advertising; 54 percent on online banners; 46 percent on online video/OTT; 42 percent on direct mail; 34 percent on mobile marketing; 32 percent on out-of-home/outdoor advertising; and 32 percent on broadcast TV.[158]

Claims that broadcasters have not shown that reform of the local radio caps will improve stations' ability to compete with digital ad outlets specifically ignore the record. Numerous commenters attested that allowing an increase in local scale will provide radio station owners with the resources necessary to offer new or to expand their existing localized digital advertising products, thereby improving their competitiveness in the advertising market.[159]

Fargo, ND, and Nashville, TN, and explaining that, with greater scale, his company would garner a larger share of ad buys because "we will have more rating points and listeners" and that by selling different program formats, his company would "open up new categories for advertising"); Radio Fargo-Moorhead Comments at 4 (as well as precluding cost savings like sharing office and studio space and equipment, the local radio rule prevents local broadcasters from "present[ing] advertisers with more appealing 'bundles'").

[156] NAB 2019 Reply Comments at 41 & n.129 (reporting that 90 percent of local advertisers used both traditional and digital advertising, citing Borrell Associates, *Local Media's New Phase: Survival of the Fittest* (Mar. 11, 2019)). In its 2019 local advertising survey, Borrell found that 89 percent of advertisers used a mix of advertising, rather than any single type. Survey respondents used 6.2 different types of advertising, on average, with 81 percent buying both digital and non-digital. Inside Radio, *Where Radio Fits In The Advertising Plans Of Local Marketers* (Sept. 17, 2019).

[157] NAB 2019 Comments at 23; BIA Radio Study at 12-13.

[158] Inside Radio, *Despite Ad Downturn, Digital 'Defied Gravity' For Radio In 2020* (Feb. 11, 2021) (citing Borrell's 2020 survey of local radio buyers, which identified 17 different advertising and marketing options used by radio advertisers). *See also* Borrell, *Results from Borrell's 2021 Local Advertiser Survey* (Aug. 2021) (from a survey fielded April-June 2021, reporting again that local advertisers use myriad digital and traditional advertising options); Inside Radio, *Borrell Survey Points To Strengthening Ad Market* (Aug. 26, 2021) (reporting on results of Borrell's spring 2021 survey and identifying the wide range of marketing options used by local advertisers).

[159] 2019 Joint Comments at 21-22, 24-25.

Station owners and executives submitted declarations stating that, with additional stations and resources, they could expand their digital advertising products and services into more markets, including small and mid-sized ones.[160] Broadcasters pointed out that the resources generated through economies of scale would enable radio station owners to invest more heavily in their digital platforms and services and their localized digital brands and, thus, more aggressively compete with their digital competitors.[161]

Because advertisers want to buy from companies selling packages of traditional and digital ad products, analysts further have observed that the radio industry has a "big" opportunity to increase its ad revenues by offering both on-air and digital ad options to businesses.[162] Permitting radio broadcasters to increase their scale would enable them to invest in the staff, digital ad products, data management tools, and software necessary to take advantage of these opportunities.[163] A 2020 survey by Borrell and the Radio Advertising Bureau again

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[160] Frandsen Decl. at 2 (stating that having the resources to hire just a few new staff members would enable their stations to dedicate employees to combining traditional radio advertising with digital tools to attract advertisers); Wright Decl. at 2 (attesting that if his company could expand its footprint in markets such as Lansing, MI, it would be better able to build advertising campaigns for clients that combined on-air radio with a digital strategy, a "critical part" of securing advertising); Hellum Decl. at 5 (stating that additional scale would enable his company's stations to compete more effectively against digital competitors by attracting listeners through more diverse formats with localized content and by offering more digital ad products and opportunities to local advertisers); Decl. of Gary Shorman, Eagle Commc'n, at 1, Exh. C to 2019 Joint Comments (stating that, with greater scale and resources, his company's stations could offer more robust digital products and services and better compete with digital competitors for ad dollars); Walker Decl. at 2 (stating that, in markets like La Crosse, WI, greater scale would enable their stations to more effectively execute interactive and digital marketing and that, with more opportunities to sell interactive partnerships combining local radio and social media, their stations could compete with larger companies); Decl. of Beth Neuhoff, Neuhoff Media, at 1, Exh. C to 2019 Joint Comments (Neuhoff Decl.) (explaining that a more substantial local presence would provide a larger base from which to expand her company's digital offerings to compete with online outlets).

[161] Joint Reply Comments of 25 Broadcast Licensees at 19.

[162] Gordon Borrell, CEO, Borrell Associates, *What Radio Buyers Are Doing* (Feb. 18, 2019). *See also* BIA Advisory Services, Press Release, *Small Businesses Will Buy Advertising Across Eight to 15 Different Platforms This Year, According to BIA's U.S. SAM Survey* (May 9, 2019) (stating that small businesses' desire for advanced targeting capabilities in advertising represents a "key pathway for traditional media sellers to secure new digital spend").

[163] *See, e.g., What Radio Buyers Are Doing* (explaining that radio is a "fantastic driver of digital action," as proven by software programs that link advertisers' website traffic to their radio ad schedule and show that as a radio "spot airs, traffic rises"); Inside Radio, *"Significant" Growth In Radio's Digital Sales Efforts* (Jan. 18, 2019) (noting shifts among

stressed that stations need to engage in additional and continued training of sales staff and provide more and improved digital products to increase their digital ad sales.[164] Clearly, hiring, training, and retaining (*i.e.*, competitively compensating) staff with expertise in digital advertising and in selling digital ad products that meet advertisers' needs require significant investment, which only those stations with sufficient revenues and cash flow can afford.[165]

Contrary to implications that radio stations simply cannot compete for advertisers wanting digital ad options regardless of the restrictions on broadcasters' scale, available evidence shows that radio broadcasters' digital advertising revenues, unlike their OTA ad revenues, are growing rather than declining,[166] and that some radio groups now earn a notable portion of their total ad revenues from digital.[167] But even the radio companies most successful in attracting digital advertising dollars have stressed the need to expand their digital product offerings to capture a greater proportion of the vast pool of spending that advertisers have shifted from traditional media to digital platforms.[168]

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local advertisers that could "benefit radio companies that have strong digital ad products and a sales force trained in how to sell them").

[164] J. Chaudhari, *The Digital Advertising Boom of 2020*: *Debriefing the RAB-Borrell Annual Benchmarking Report*, radiomatters.org (Feb. 10, 2021) (discussing survey of radio station managers who cited training and more and better digital products as the two most important factors for growing digital sales).

[165] NAB has heard from its broadcast members that they have difficulty retaining trained employees with expertise in digital ad products because such employees have other employment options.

[166] Despite the "steep decline" in local radio stations' total ad revenues in 2020, stations' digital sales increased nearly 12 percent. Inside Radio, *Despite Ad Downturn*, *Digital 'Defied Gravity' For Radio In 2020* (Feb. 11, 2021). NAB recently documented the stark declines in radio stations' OTA (and total) ad revenues over time. *See* NAB Supplemental Comments at 75-78 and Attachment G; NAB Supplemental Reply Comments at 66-67 and Attachment A.

[167] *See* Inside Radio, *How Radio Companies Have Become "Digital Over-Achievers"* (May 28, 2019); *see also* Supplemental Joint Comments at Exh. B, Borrell Report at 8 (identifying several radio companies, including Townsquare, as earning particularly high percentages of their ad revenues from digital sales).

[168] Townsquare, for example, has attested that additional scale would enable it to offer more digital advertising opportunities to local advertisers and that additional resources in their local markets could allow their stations to expand their "product offerings to recapture some of the dollars" now going to new digital competitors. Hellum Decl. at 5; *see also* n. 160, *supra* (attestations from small and mid-sized broadcasters that greater local scale would enable them to better compete against digital competitors by hiring additional dedicated staff, expanding their digital products and services, and building ad campaigns combining on-air radio with digital marketing).

Finally, the BIA Study provides more evidence that reforming the ownership limits would positively impact stations' advertising revenue. While, as discussed above, the BIA Study focused on the increased efficiencies and cost savings achieved from common ownership to conservatively evaluate the economic benefits of relaxing the current ownership caps, it further found that FM stations in larger local groups constrained by the ownership rules had an advantage over unconstrained stations in generating advertising revenue.[169]

Appendix A of BIA's Study compared the advertising revenues earned by FM stations in constrained and unconstrained local groups. For the 212 Nielsen markets with both constrained and unconstrained FM stations, the Study found that both the average and median FM stations in the larger constrained groups generated much higher levels of ad revenue than FM stations in smaller unconstrained groups across all markets.[170] Notably, this revenue advantage for FM stations in constrained clusters was greater than those stations' advantages in populations reached or ratings achieved. Because stations in larger constrained groups appeared better able to turn potential audiences into revenue than were unconstrained stations, BIA found that relaxing the ownership rules to permit the formation of larger combinations would likely increase station revenues, compared to the revenues earned by the same constrained and unconstrained stations prior to their combination.[171]

To further evaluate the revenue-earning advantage evidently possessed by FM stations in larger clusters, the BIA Radio Study next compared the revenues of constrained and unconstrained FM stations after accounting for the impact of the larger populations generally reached by constrained stations. Even after controlling for population, in 2018 the average FM station in larger constrained clusters generated *64.6 percent greater revenue* than the average FM station in smaller unconstrained groups in the same markets. In the median market, constrained FM stations generated *29.4 percent greater revenue* than unconstrained FM stations.[172] In its Study (as set forth below),[173] BIA compared the median revenue advantage of FM stations in constrained groups over FM stations in unconstrained groups in all market size ranges, after controlling for differences in populations reached:

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[169] BIA Radio Study at 27, 31, and Appendix A; NAB 2019 Comments at 38; NAB Supplemental Comments at 80-81.

[170] In 2018, the average FM station in constrained groups generated 167.8 percent greater revenue than the average FM station in unconstrained groups in the same markets. In the median market, constrained FM stations generated 93.3 percent greater revenue than unconstrained FM stations. BIA Radio Study, Appendix A at 37.

[171] BIA Radio Study, Appendix A at 38.

[172] *Id*. at 38-39.

[173] *Id*. at 39.

Market Size Rankings	Median Market Revenue Per Population Reached Advantage of Constrained Group vs. Unconstrained Group Stations
1-10	21.46%
11-25	11.91%
26-50	17.18%
51-75	51.12%
76-100	75.75%
101-125	38.18%
126-150	21.94%
151-200	34.16%
201+	29.01%

These data indicate that FM stations in larger local groups are more effective than FM stations in smaller groups at turning potential audiences into actual ad revenues across all-sized markets.[174] Based on these data, BIA stated that the total financial benefits stemming from ownership reforms would likely be greater than the substantial cash flow improvements derived from the cost savings and efficiencies gained from achieving increased scale economies because revenue per station in larger combinations would be expected to grow as well.[175] The FCC therefore must reject mischaracterizations of the BIA Study's conservative focus on cash flow and costs savings derived from scale economies as an alleged "implicit admission" of the lack of an evidentiary basis for NAB's argument that reforming the ownership caps also would enhance broadcasters' ability to generate ad revenue.[176]

The data showing that FM stations in larger groups constrained by the FCC's rules earned an average 64.6 percent greater revenue than unconstrained stations (even after accounting for population) also undercut arguments that owning additional FM stations locally would do little, if anything, to enable radio broadcasters to compete more effectively for advertising dollars, due to the lesser performance of the fifth (or sixth or seventh) stations in a cluster.[177] Beyond being contrary to the above-described empirical evidence about the revenues of station clusters, this argument is unconvincing for several other reasons.

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[174] BIA Radio Study at 27, 31, and Appendix A.

[175] BIA Radio Study at ii, 31; NAB 2019 Comments at 38; NAB Supplemental Comments at 80-81; *see also* Alpha Media Reply Comments at 5 (stating that in its experience, revenue per station would be expected to increase in larger combinations).

[176] iHeart 2019 Reply Comments at 22; *see also* iHeart Supplemental Reply Comments at 10-11.

[177] iHeart 2019 Reply Comments at 22-23.

First, NAB observes that this position is contrary to the actual behavior of broadcasters in the market and to the firm convictions of dozens of broadcasters in the record. The BIA Radio Study found that in the Nielsen Audio markets, 382 local station groups are currently constrained by the FCC's limit on the number of commonly owned FM stations.[178] Many broadcasters in markets of all sizes also have strongly urged the FCC to adopt NAB's proposal to raise the FM limits in large markets and eliminate the FM caps in mid-sized and small markets (or even to eliminate all radio caps). If owning five or more FM stations in a local market does not provide broadcasters with the ability to compete more effectively for advertising revenues, it is difficult to understand why so many broadcasters own five FM stations (or whatever the maximum number allowed) in numerous markets and why so many broadcasters are convinced they must acquire additional stations to compete in today's marketplace. It seems inherently unlikely that myriad successful and dedicated radio broadcasters fail to understand their local markets and are completely mistaken about how they may improve their own financial and competitive positions.[179]

Second, those questioning the benefit of owning additional FM stations misunderstand a main point of the BIA Radio Study and its analysis of economies of scale. BIA did not assert that the fifth (or sixth, seventh or eighth) FM station in a local cluster would be as strong or as profitable as the top performing FM station in the cluster. Rather, the Study showed that FM stations added to local clusters beyond the FCC's existing caps would be much stronger than they would be as stand-alone stations or as part of smaller clusters, and that combinations of unconstrained and constrained clusters result in significant efficiencies, costs savings, and improved cash flow for local broadcasters.[180] As a result, these sixth, seventh or eighth commonly-owned FM stations would be able to play more significant competitive roles in their local markets and likely offer better service to local audiences.

As the Commission has stated, "[t]o secure the highest [advertising] rates and to compete for advertising market share, [radio] stations strive to gain the largest audience of listeners possible to maximize the price of ad time sold by the station."[181] Owning more stations that air diverse programming designed to attract the widest possible range of listeners will help stations grow their audiences; secure more favorable advertising rates; increase cash flow;

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[178] BIA Radio Study at 19-20.

[179] *See* Inside Radio, *iHeart Explains Why It Opposes NAB's Deregulation Proposal* (June 27, 2018) (quoting an iHeart memo to its employees stating that, if the FCC altered its ownership rules as NAB proposes, the company would "potentially be the biggest buyer of additional stations" and directing its executives to "be thinking about the stations in your markets that we might add to your portfolio"). This statement appears inconsistent with the argument that owning additional FM stations in local markets will not enable broadcasters to compete more effectively for advertising dollars.

[180] *See* BIA Study at 26-31.

[181] *Communications Marketplace Report*, 33 FCC Rcd 12558, 12633 (2018).

enable the investment in staff, training, and digital advertising products necessary to take greater advantage of digital ad opportunities; and thus compete more effectively for both digital and traditional ad dollars. It flies in the face of the most basic economic facts for commenters to contend that eliminating or reforming the FCC's asymmetric ownership rules to permit radio broadcasters to acquire additional stations and attract additional audiences would not enhance their competitiveness in the media and advertising markets.

In short, the record demonstrates that increased common ownership of radio stations in local markets would improve broadcasters' competitive and financial position in today's marketplace by enabling the realization of economies of scale and the generation of additional advertising revenues. While certain commenters contend that the magnitude of the challenges facing radio broadcasters is greater than what may be achieved by reforming the radio ownership caps,[182] that contention, even if true, does not warrant the Commission throwing up its hands and retaining competitively unnecessary – indeed harmful – ownership restrictions. Such inaction would be contrary to the FCC's Section 202(h) obligations. In any event, nothing in law or economics justifies inaction by an agency even though the action taken might not solve 100 percent of the problem identified.

V. Those Commenters Opposing Any Reform or Supporting Only Partial Reform of the Local Radio Rules Offer No or, at Best, Inadequate Answers to FM and AM Radio Broadcasters Struggling to Compete and Serve Their Communities Effectively

Predictably enough, commenters criticizing NAB's radio reform proposals ignore the basic truth that radio stations' financial and competitive viability are necessary preconditions to providing quality service and fulfilling the FCC's localism goals. While certain commenters called upon radio broadcasters to be more local or innovative or to provide more compelling programming, they offered no concrete proposals for helping broadcasters, including FM and those in smaller markets, maintain – let alone improve – their competitive position or their local services.[183] Blithely asserting that "FM radio *could* still be uniquely local" if radio owners only took the public interest seriously[184] not only insults the broadcasters striving to

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[182] iHeart Supplemental Reply Comments at 10. *But see* Clear Channel 2010 Quadrennial Comments at 14 ("Giving terrestrial radio broadcasters equal treatment by eliminating the local radio ownership caps will enable the industry to remain competitive in the current, unsettled economy and in today's age of media abundance.").

[183] *See, e.g.*, Coalition Reply Comments at 13 (decrying perceived decline in localism); Coalition Communications Marketplace Comments at 11 (radio industry should work to correct its problems through "investment in local communities," "innovation," and "compelling localized programming); NABOB 2021 Comments at 14 and NABOB 2019 Comments at 11 (both quoting 2018 iHeart letter to FCC as stating that owning "more FM stations is not a substitute for innovation, ideas, relationships, compelling programming and data solutions for our advertising partners").

[184] Coalition Reply Comments at 13 (emphasis in original).

serve their communities every day, but also yet again shows the hollowness of the Coalitions' frequent invocation of the "public interest" in the absence of any realization that high quality local broadcast service depends on stations' competitive health.[185] As a result, the record is devoid of serious proposals by those parties attacking ownership reform that would enable local radio (or TV) stations to enhance their community services.

Indeed, the opponents of updated rules disregard the clear record here. AM or FM stations struggling or unable to earn adequate ad revenues in today's competitive marketplace cannot, no matter how much they wish, maintain the levels of local services and content they believe their communities deserve. As one small radio broadcaster declared, the "economies of covering the news in a declining revenue space are prohibitive."[186] Again, the math is simple. Stations with falling or insufficient revenues cannot pay the salaries to maintain a significant local staff, including reporters and on-air talent, let alone hire more employees.[187] Local broadcasters have detailed the additional content they would provide with greater resources, including "expensive" news coverage, local college and high school sports, more diverse and niche music programming, and increased coverage of community events and service campaigns.[188]

NAB observes, moreover, that radio stations, if they had greater scale and financial wherewithal, would be incentivized to expend those resources to provide locally-oriented services and content because broadcast stations have an advantage in offering local programming, compared to many non-broadcast outlets. Providing differentiated locally-centered programming helps broadcast stations stand out among the array of audio (and

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[185] *See* NAB Communications Marketplace Reply Comments at 6-7 (noting that despite the Coalitions' repeated recitation of the "public interest," they turned a blind eye to the industry's competitive struggles and evinced no understanding of what it takes, as a matter of simple economics, for stations to survive in a hyper-competitive marketplace or to serve the public interest effectively).

[186] Neuhoff Decl. at 1 (documenting decline in the number of local news reporters at radio stations in Danville, IL market, and stating that "[w]e would love to have a bigger newsroom but declining margins do not currently allow it").

[187] *See, e.g.*, Decl. of Susan Patrick, Legend Commc'n of WY, LLC at 2, Exh. C to 2019 Joint Comments (Susan Patrick Decl.) (observing that employee salaries are her stations' "largest expense" and that declining revenues make it "much harder to sustain the full-service operations that our listeners deserve"); Zimmer Radio *Ex Parte* at 2 (stating that "[w]hen station revenues decline, the biggest impact falls on staffing" and that retaining jobs is a "growing challenge," although Zimmer Radio does "everything we can to avoid laying off employees, which would impact our ability to serve our communities").

[188] Brewster Decl. at 2-3. *Accord* Wright Decl. at 5; Walker Decl. at 2-3; Frandsen Decl. at 2; Decl. of Jeffrey Warshaw, Connoisseur Media, at 2, Exh. C to 2019 Joint Comments; Alpha Media Reply Comments at 5-6; Letter from Susan Patrick, Legend Communications, LLC to Marlene H. Dortch, FCC, MB Docket No. 18-349, at 1 (May 30, 2019).

video) options now available to consumers. Radio (and TV) stations could better fill the "local" market niche – and thus compete for audiences and serve their communities more effectively – in today's splintered media marketplace with increased local scale enabled by ownership rule reform.

Those parties supporting regulatory relief for AM stations (or at least not opposing it) while strongly opposing any relief for FM stations provided no sound reasons for their split position and, again, offered nothing to address the serious competitive problems facing many FM stations.[189] As NAB has repeatedly shown with empirical evidence, FM stations, like the radio industry overall, face vastly expanded competition in the media and ad markets, especially from digital options.[190] These data stand unrefuted.[191] Thus, no economic basis justifies relief for the AM service but not for FM, and NAB agrees with other commenters opposing the idea that FM radio should be left to decline under outdated local restrictions while relief is granted to AM stations.[192]

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[189] *See* iHeart 2019 Comments at 1; iHeart Supplemental Comments at 5; iHeart Supplemental Reply Comments at 2 (all supporting elimination of limits on AM ownership but supporting retention of current FM ownership limits). *But see* Clear Channel 2010 Quadrennial Comments at ii-iii, 37-45 (supporting repeal of all radio limits or, at the least, abolishment of the AM/FM subcaps, which are "unjustifiable as a legal and factual matter" and which "unnecessarily constrain radio industry participants"). *See also* Coalition Reply Comments at 6 (opposing any loosening of FM caps but taking no position on AM caps).

[190] *See, e.g.*, NAB Supplemental Reply Comments at 66-68 and Attachment A (documenting stark declines in FM stations' nominal and real ad revenues and Average Quarter Hour (AQH) listening, the audience metric upon which advertising is sold); Comments of NAB, GN Docket No. 20-60, at 18-19 (Apr. 27, 2020) (documenting significant declines in FM stations' nominal and real ad revenues).

[191] Indeed, even comments opposing relief for FM stations described substantial declines in FM stations' ad revenues and listener levels. *See* iHeart Supplemental Comments at 23-25 (reporting that FM stations' AQH listening fell 20 percent from September 2018 to June 2021, while AM stations' AQH listening decreased by only 12 percent during the same period, and that AM and FM stations both experienced the same large declines in advertising revenue from 2018-2020, about 24 percent each). Salem observed that the COVID-19 pandemic took a toll on AM stations, which are typically dependent on local advertisers. Salem Supplemental Reply Comments at 8. Advertising-dependent FM stations similarly suffered, so the pandemic and related recession do not justify a refusal to reform the FM radio caps.

[192] *See* Supplemental Joint Reply Comments at 7 (observing that iHeart conceded the impact of digital competitors on both AM and FM stations, but seemingly contended that FM should be left to decline while AM should be deregulated promptly); 2019 Joint Reply Comments at 8-9 (same); WBOC Reply Comments at 4 (calling iHeart's position "wrongheaded" from "both a consumer perspective and a competitive perspective" and pointing out that, because radio

Nor does any other putative rationale support the notion that AM radio should be deregulated but FM should be regulatorily disfavored. Claims that granting regulatory relief to FM radio could cause "grave" or even "calamitous" harm to the AM service[193] should be rejected as unsupported by data or sound reasoning,[194] as well as inconsistent with the claimant's prior position.[195] Not only is it unproven and unlikely that reforming (but not eliminating) the FM caps, as NAB proposed, would seriously harm the AM service,[196] but this claim also ignores the actual marketplace cause of the entire radio industry's competitive struggles – the competition for ad revenues and audiences presented by myriad audio (and

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broadcasters' competitors are not waiting, WBOC should not have to wait for regulatory relief allowing it to better compete).

[193] iHeart 2019 Comments at 29; iHeart Supplemental Reply Comments at 11-12; *accord* Salem Supplemental Reply Comments at 4, 9.

[194] *See* Joint Reply Comments of 25 Broadcast Licensees at 20-21 (refuting "speculative and poorly reasoned" claims that elimination of FM subcaps would cause AM band to become less viable); 2019 Joint Reply Comments at 9-11 (urging FCC to reject arguments that preserving existing ownership limits on FM radio would protect AM radio).

[195] *See* Clear Channel 2010 Quadrennial Comments at 43 (declaring that "AM and FM stations are equal, and equally important, participants in our nation's system of terrestrial radio broadcasting" and that "no rational justification" existed "for retaining subcaps that limit ownership of stations in one or the other service based on some arcane perceived distinction between them"). This inconsistency extends to whether AM stations suffer from a competitive disadvantage vis-à-vis FM stations. *Compare* iHeart Supplemental Comments at 22 and iHeart 2019 Comments at 14 (alleging a growing competitive disparity between AM and FM as a basis for deregulating AM but not FM) *to* Clear Channel 2010 Quadrennial Comments at iii (stating that if any "colorable justification" ever existed for the AM/FM subcaps, "it has been totally eviscerated not only by the evidence of AM radio's strong performance as a competitor and revenue generator, but by technical advances that have provided AM stations a host of means to compensate for any technical inferiority to FM stations").

[196] *See, e.g.,* NAB 2019 Reply Comments at 50-53 (explaining that no commenter had offered any reason to believe that adopting NAB's proposal would cause AM radio to disappear, and that NAB's proposal removing all caps on AM ownership would promote demand for AM stations and would not force, or even encourage, broadcasters to sell their AM stations); Alpha Media 2019 Comments at 2 (explaining that technological advances, including online streaming, HD radio, and use of FM translators to augment AM signals have enhanced the ability of AM radio to complete in the marketplace and noting that "many of the top stations in large and small markets are AM").

video) content providers and advertising options, including digital.[197] To restate the obvious, handicapping FM stations by refusing to grant any regulatory relief will not help AM stations meet their competitive challenges.

While NAB agrees with commenters that AM stations provide valued service to the public,[198] the value of AM service provides no rational basis for declining to grant regulatory relief to FM stations, which similarly provide highly valued programming, including public health and safety information.[199] And even assuming demand for some AM stations would decrease if the FM caps were reformed, that in no way justifies retaining outdated and harmful FM limits. Under the Communications Act, the FCC should consider and address the continued viability of the public's radio service as a whole and across all-sized markets.[200] It would be inappropriate for the Commission to effectively coerce broadcasters into acquiring or retaining one type of radio outlet over another.[201] That is not the meaning of the public

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[197] *See*, *e.g.*, Supplemental Joint Reply Comments at 7 (observing that iHeart's own comments recognized that both AM and FM radio stations are suffering due to increased competition from digital competitors); NAB Supplemental Reply Comments at 65-69 (explaining that the radio industry as a whole, including both AM and FM stations, is facing competitive and financial challenges in today's broad and increasingly digital-dominated content and ad markets).

[198] *See* iHeart Supplemental Comments at 13-21; iHeart Supplemental Reply Comments at 13-15; Salem Supplemental Reply Comments at 8.

[199] No basis supports the suggestion that loosening the FM caps could endanger public safety. *See* iHeart 2019 Comments at 24; iHeart Supplemental Comments at 21; iHeart Supplemental Reply Comments at 11-12. Not only does that supposition depend on the highly suspect claim that the AM service would be decimated by FM regulatory relief, but it also ignores the fact that thousands of FM stations, as well as TV stations, across the U.S. provide EAS alerts, emergency journalism, and, more recently, pandemic-related information. AM stations are not the only providers of such important local services. *See, e.g.,* NAB 2019 Reply Comments at 51-52; *see also* Section II.A., *supra* (discussing FCC's previous findings that the "overwhelming majority" of programming on news/talk radio stations is nationally syndicated, not locally produced).

[200] *See* NAB Supplemental Comments at 6-10 (explaining that to fulfill Congress's vision in the Communications Act, the FCC must ensure its broadcast regulatory framework, including its ownership rules, enables radio and TV stations to serve the public interest and their communities of license, which means, as a practical matter, that the broadcast industry must remain economically viable in a highly competitive marketplace and in local markets of all sizes, including smaller ones with limited advertising bases).

[201] *See* NAB 2019 Reply Comments at 50.

interest under the Communications Act and would not fulfill the FCC's Section 202(h) obligations.[202]

Rather than disregarding the clear challenges facing FM stations, NAB's approach strikes the proper balance by proposing maximum regulatory relief for AM radio and meaningful relief for FM radio. NAB's proposal accounts for the declining ad revenues and listening levels of FM stations, as discussed above, and the special challenges facing radio stations, including FM, in smaller markets. The Commission previously eliminated the "eight voices" portion of the local TV rule in part due to concerns about TV stations' competitive viability and their ability to offer high quality local programming, including news, in "revenue-scarce small and mid-sized markets."[203] These concerns apply equally to small and mid-sized radio markets, as NAB has documented the limited advertising revenues available to and earned by radio stations, including FM, in smaller markets.[204]

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[202] The record documents several instances in which AM operations shifted to the FM band (or were simulcast on the FM band) and enjoyed considerable success with audiences. *See id*. at 53-54; Salem Supplemental Replies at 5; Comments of Salem Media Group, MB Docket No. 18-349, at 4-6 (Apr. 29, 2019). NAB again observes that the ownership caps should not be used to require radio broadcasters to continue operating AM stations, which would be contrary to the public interest if broadcasters believed that offering content on FM stations would better serve their audiences. NAB 2019 Reply Comments at 53-54; *accord* 2019 Joint Reply Comments at 10 (pointing out that if AM programming would be more successful on an FM station because it would reach a larger audience, the public would be better served by allowing that programming to reach more people). *See also* NABOB 2021 Comments at 13 (supporting retention of current radio caps because "companies seeking to maximize the number of stations they own in a market *must* now own AM stations" and opposing giving radio companies "*permission* to abandon AM radio as part of their maximization strategies") (emphasis added). Beyond improperly coercing owners into one type of investment over another, NABOB's reasoning is not even logical. NAB proposes no caps on AM ownership so owners could "maximize" their number of AM stations in all markets without any FCC limit, and, in larger markets, they would need to acquire AM stations to "maximize" overall station ownership because NAB's proposal would limit FM ownership in those markets.

[203] 2017 Reconsideration Order, 32 FCC Rcd at 9836.

[204] *See* NAB Supplemental Comments at 31-33 and Attachment C; NAB 2019 Comments at 31-32; BIA Radio Study at 14 (all showing that the average radio station in markets 76-100, 101-125, 126-150, 151-200 and 201+ earn only a fraction of the ad revenues earned by radio stations in the top-10 markets). In 2019, BIA reported that, in Nielsen markets 201+, 73.3 percent of unconstrained FM stations (*i.e.*, those not part of local clusters constrained by the FCC's rules) garnered $500,000 or less in revenue annually and 50.0 percent of those FM stations garnered only $250,000 or less annually. BIA Radio Study at 34 (also reporting that 66.3 percent, 58.9 percent, and 49.5 percent of unconstrained FM stations in markets 151-200, 126-150, and 101-125 garnered $500,000 or less in revenue annually, with 44.2

Those opposing reform also ignore the public benefit of permitting currently constrained FM station clusters to combine with additional FM stations. The BIA Radio Study showed that numerous FM and AM radio stations today, especially in smaller markets, struggle to cover their fixed costs and thus cannot invest in improving their stations' services or facilities.[205] Under the FCC's existing rules, these stations often are "stranded plant" unable to provide meaningful local service and community involvement, and yet unable to be acquired by broadcasters seeking to expand their local reach and capable of improving the stranded stations' services and financial viability.[206] Reform opponents would continue to leave such (FM) stations stranded.

Finally, the claim that denying regulatory relief to FM but not to AM radio somehow aligns with President Biden's Executive Order on promoting economic competition does not reflect that order's text.[207] To the extent that the Executive Order addresses telecommunications or the FCC, it focuses on the "dominant" Internet platforms and the lack of competition, and consumer overpayment, for broadband, cable TV, and other subscription services.[208] The Executive Order did not discuss broadcast radio or TV. If anything, the President's Order buttresses NAB's proposals for reforming the local ownership rules, as it recognized (in Section 1) the impact that large Internet platforms have had on other businesses across the

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percent, 40.4 percent, and 36 percent of unconstrained FM stations in those market size ranges garnering $250,000 or less). Such data readily explain why so many smaller broadcasters and those in small and mid-sized markets support NAB's radio ownership proposal or even complete elimination of all radio caps. *See* Section IV.A., *supra*.

[205] *See* NAB 2019 Comments at 32-33; BIA Radio Study at 31-34; NAB Supplemental Comments at 78-79.

[206] Joint Reply Comments of 25 Broadcast Licensees at 16-17. *Accord* Supplemental Joint Comments at 26-27 and Exh. C, Decl. of Lawrence Patrick at ¶¶ 5, 8; NAB Supplemental Reply Comments at 65-66; NAB 2019 Comments at 35-36; BIA Radio Study at 1-3; Susan Patrick Decl. at 2 (noting that some struggling radio stations in Wyoming do not provide robust local service or participate in the community, but that Legend is unable to acquire them, as those stations have asked); Brewster Decl. at 3 (citing example of a station with little community involvement in Montrose, CO that Cherry Creek Media cannot acquire and improve under current rules); Walker Decl. at 2 (observing that other operators' radio stations in smaller markets in Indiana and Wisconsin where Mid-West Family owns stations lack resources and provide little original local content, including news).

[207] *See* iHeart Supplemental Comments at 11-13; iHeart Supplemental Reply Comments at 7 n. 17.

[208] *Executive Order on Promoting Competition in the American Economy*, at Sections 1 and 5(l) (July 9, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

economy and the deleterious effect that the platforms' "dominance in advertising markets" has had on local media (specifically, newspapers).

In sum, those parties claiming that increased common ownership (or at least increased common FM ownership) will not help the radio industry, but that increased localism, better programming, and more innovation would, fail to answer the most obvious question: How are commercial broadcasters facing unprecedented competition and declining total ad revenues supposed to pay for enhanced programming, additional employees, innovative digital ad products, and improved technical facilities? The only answer that makes economic sense is to permit local radio broadcasters to achieve greater economies of scale, improved cash flows, and the opportunity to attract more sizable audiences and ad revenues. Thus, the Coalitions and other commenters have it backward. Relaxing the ownership caps to promote the competitiveness – if not the very survival – of local radio stations, especially in smaller markets, will promote, not impede, the FCC's localism goal.[209] After all, financially viable local radio stations are much more incentivized to and interested in serving local communities than are Google, Facebook, Pandora, or Spotify.[210]

VI. Maintaining Antiquated Ownership Caps Will Not Successfully Foster New Entry into the Radio Industry but Will Only Undermine Its Long-Term Competitiveness

The Coalitions accuse NAB of "falsely" asserting that the ownership rules have not promoted ownership diversity and contrarily claimed that the local radio ownership caps have been "crucial" in protecting remaining diversity in radio ownership.[211] It is the Coalitions that have made unsupported and highly questionable assertions here. They discussed no empirical data or studies establishing that the broadcast ownership rules have effectively promoted minority and female ownership. The facts instead support NAB's position, given that 80 years of maintaining structural ownership levels have not materially fostered minority and female ownership and that the levels of diverse ownership were notably *lower* in the past when the ownership rules were much stricter than today.[212] Indeed, the Commission previously

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[209] *See* Coalition Reply Comments at 9-10, 13-14 (erroneously claiming that ownership deregulation undermines localism).

[210] *See, e.g.,* Neuhoff Decl. at 1 (observing that these large digital services take a very substantial share of local ad dollars but are "nowhere to be found" when radio stations are covering local events or emergencies, unless the stations "post[] a story that can be shared, searched or quoted"); Golden Isle Reply Comments at 3 (stating that the tech giants "do not share the FCC's concerns about localism *at all*" and are "under no obligation whatsoever to serve or even consider the public interest") (emphasis in original).

[211] Coalition Reply Comments at 23.

[212] *See* NAB Supplemental Reply Comments at 20-21; NAB 2019 Reply Comments at 17-18.

recognized that its multiple ownership rules were "not designed to foster minority ownership in the broadcasting industry" and have "not yielded such an effect."[213]

Beyond 80 years of history, the findings of the FCC's last completed quadrennial review are directly contrary to the Coalitions' insistence that stricter ownership rules promote diverse ownership. In 2016, the Commission, citing its own data and data from NTIA and Free Press, found that minority ownership of radio stations grew after the 1996 Act and that minority ownership of TV stations increased following the modest loosening of the local TV rule in 1999,[214] consistent with earlier studies on radio finding that "minority groups increased their radio ownership" after 1996.[215] Indeed, the FCC concluded in 2016 that "[n]o data provided in the record support a contention that the [local TV] duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women," or that "tightening the local radio ownership limits would promote ownership opportunities for minorities and women."[216] Earlier in that same quadrennial review proceeding, moreover, the Commission had expressed "agree[ment] with commenters, including NAB, that the low level of minority and female broadcast ownership cannot be attributed solely or primarily to consolidation," but recognized other factors, "most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting."[217]

Tellingly, the commenters cited by the Coalitions similarly did not provide empirical data or statistical analyses demonstrating that relaxing the current radio (or TV) ownership restrictions would harm ownership diversity *in the future*,[218] as the Supreme Court has indicated may be required.[219] And, like other commenters in this proceeding, the Coalitions

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[213] 1984 Ownership Order, 100 FCC 2d at 48 (reforming rule that had limited a single entity to owning seven AM, seven FM, and seven TV stations nationwide).

[214] *See* 2016 Ownership Order, 31 FCC Rcd at 9895, 9911-12.

[215] NTIA, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, at 38 (Dec. 2000). *See also* Kofi A. Ofori, *Radio Local Market Consolidation & Minority Ownership*, at 10-12, Appendix One to Comments of MMTC, MM Docket Nos. 01-317 and 00-244 (Mar. 21, 2002) (showing increase in the number of minority owned and controlled radio stations since 1997).

[216] 2016 Ownership Order, 31 FCC Rcd at 9895, 9912.

[217] 2014 Quadrennial FNPRM, 29 FCC Rcd at 4470.

[218] *See* Coalition Reply Comments at 23-24.

[219] In upholding the FCC's 2017 decision reforming several ownership rules, the Supreme Court found that no commenter had produced "evidence indicating that changing the rules was likely to harm minority and female ownership," and specifically found wanting two Free Press studies that were "purely *backward-looking*" and offered "no statistical analysis of the likely *future* effects of the FCC's proposed rule changes on minority and female ownership."

called on the FCC to commission studies on the "harms that consolidation causes to ownership diversity," apparently presuming in advance the outcome of such studies.[220] Yet again like other commenters, the Coalitions failed to propose any designs for new studies that might produce empirical evidence supporting their claims about the efficacy of structural ownership restrictions in fostering minority and female ownership, thereby begging the question of whether such evidence even exists.[221]

Ironically, while the Coalitions correctly recognized that lack of access to capital hinders diverse broadcast ownership,[222] they fail to understand that their "solution" – maintaining existing ownership restrictions – will not solve or even directly address ownership diversity because such structural rules do not promote the provision of capital to minorities and women. Indeed, the opposite is true, as asymmetric regulations on broadcasting, including structural ownership rules, discourage investment in and the provision of capital to broadcasters and make non-broadcast investment opportunities comparatively more inviting.

Predictably, the Coalitions never explained *how* structural ownership rules would better enable new entrants, including minorities and women, to obtain investment capital needed to acquire and operate stations. It strains reason to insist that they do. As explained in previous quadrennial reviews, ownership restrictions actually (1) reduce the asset and net worth values of station owners (including minorities and women), consequently harming their ability to borrow against their assets to finance growth; (2) artificially depress the value of broadcast stations, thereby "disproportionately increas[ing]" the ability of white male investors, who generally have greater access to capital than women and minorities, to acquire broadcast stations; and (3) reduce the long-term attractiveness of broadcasting relative to other investment opportunities.[223] Simple logic bears this out. After all, if

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Prometheus, 141 S. Ct. at 1159-60 (emphasis added). The Court also noted that the Free Press studies had shown a "long-term *increase* in minority ownership" following relaxation of the local TV and radio ownership rules in the 1990s. *Id*. (emphasis added).

[220] Coalition Reply Comments at 26.

[221] *See* NAB Supplemental Reply Comments at 23, 26.

[222] Coalition Reply Comments at 22. The FCC, other government agencies, Congress, numerous broadcasters including female and minority station owners, and former FCC Chairpersons all have agreed that access to capital is the predominant barrier to station ownership by new and diverse entities. *See* NAB Supplemental Comments at 10-15; NAB Supplemental Reply Comments at 15-16, 18-19.

[223] Reply Comments of the Center for Regulatory Effectiveness, MB Docket No. 06-121, *et al*., at 2-3 (Oct. 25, 2007); *see also* Grant Reply Comments at 2 (stating that "[l]enders, quite properly, see regulation as an impediment to growth and to the safety of their investments"); Supplemental Joint Reply Comments at 9-10 (pointing out that the falling prices of newspapers did not encourage a rush of new entrants to acquire them and that many newspapers went out of business, and observing that some radio stations now cannot be

asymmetric regulations, including ones forcing broadcasters into uneconomic ownership arrangements, artificially depress (or merely flatten) the value of broadcast stations, then investors would lack incentives to provide capital to the broadcast industry, and would instead invest in entities in other industries with increasing values, making it more difficult for existing and prospective broadcasters to obtain capital. Women and minorities who generally struggle to access capital would be even more challenged to obtain adequate financing in this environment.

The Commission previously agreed with this position. In the past when commenters opposing ownership rule reform explicitly suggested that relaxing the rules would lead to higher station prices, thereby disadvantaging minority new entrants, the FCC observed that its ownership rules were "not intended as a mechanism for artificially deflating the price of stations."[224] Moreover, the Commission repeated its determination that the "major barrier to increased minority ownership is the unavailability of adequate financing," and, thus, the "appropriate focus" of the FCC's efforts should be "promot[ing] the availability of financing to minorities on equal terms" with others.[225] The Commission then explained that, if financing is not made available to minorities, they would remain largely unable to purchase stations, whether at yesterday's lower prices, today's prices, or the "hypothetically" higher prices following relaxation of its radio and TV ownership rule, and noted that its long-standing, stricter rule had not fostered minority ownership.[226] For these reasons, the Commission concluded it

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sold "as new entrants are unwilling to enter the industry"); Decl. of W. Lawrence Patrick, Exh. C to Supplemental Joint Comments, at ¶¶ 5, 8-10 (stating that for the first time in his decades of experience, there are no buyers for some radio stations, as the "logical and best buyer[s]", *i.e.*, existing in-market broadcasters, cannot acquire them due to the FCC's rules and there are no other prospective purchasers). NAB also cited numerous economic studies concluding that asymmetric regulations in a period of expanding competition create regulatory distortion, drive up the regulated industry's costs, cause scarce capital to flow to less regulated industries, and deter new firm entry into the regulated industry. NAB Supplemental Comments at 16. The Coalition's characterizations of NAB's arguments about regulatory burdens discouraging investment in broadcasting, to the detriment of existing broadcasters, small entities, and new entrants, as unsupported and "false" are themselves false. *See* Coalition Reply Comments at 22, 25.

[224] 1984 Ownership Order, 100 FCC 2d at 48 (relaxing rule limiting AM, FM, and TV station ownership nationwide). The FCC also noted the lack of any hard evidence indicating that station prices would rise if its rule were relaxed, and further explained that, if station prices did increase, it would be because "the new group-owned stations can operate more efficiently" and thus any "such increases in station prices would be commensurate with the benefit to the general public." *Id*.

[225] *Id*. at 48-49.

[226] *Id.*

would be "inappropriate" to "retain or adopt [ownership] rules in order to deflate market prices artificially."[227]

It would be similarly inappropriate for the Commission now to retain its current radio (and TV) ownership restrictions, particularly given the record in this and other recent proceedings. Small radio broadcasters in this quadrennial pointed out that relaxing the ownership rules would help convince the lending community and sources of capital that radio broadcasting was safe to invest in again.[228] A range of commenters in the FCC's proceeding establishing a broadcast incubator program expressed particular concern about the inability to obtain financing for smaller station acquisitions.[229] In 2013, 31 minority and civil rights organizations requested an easing of restrictions on foreign investment in broadcasting, stating that U.S. banks and venture firms that formerly financed small and medium-sized broadcast transactions had "left the space entirely."[230] A lack of interest in providing investment capital to the broadcast industry, especially for modestly-sized transactions,

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[227] *Id.* at 49.

[228] *See* Grant Reply Comments at 1-2 (stating that retaining ownership restrictions will worsen the plight of independent radio owners, including minorities and women, by continuing to make it extremely difficult or nearly impossible to obtain financing to fund small radio acquisitions and start-ups, but ownership deregulation would help convince conventional sources of capital that their investments would be "safe" in broadcasting); Dick Broadcasting Comments at 2 (stating that "[t]he only way to enable broadcasters, including women and minority-owned broadcasters, to continue to operate is to relax ownership limits and send a message to the lending community that there will now be stability and scale" in the radio industry and "a justification to lend again to broadcasters," including new entrants).

[229] *See, e.g.*, Letter from G. Johnson, BIA Capital Strategies, and T. Buono and M. Fratrik, BIA Advisory Services, to Marlene H. Dortch, FCC, MB Docket No. 17-289, at 1 (June 11, 2018) (BIA Broadcast Financing Letter) (stating that the number of lenders to the broadcast industry has "declined significantly over the past decade"; that the remaining lenders focus on the "largest groups serving the larger markets with seasoned operators"; and that these "funding challenges are accentuated in medium and small markets"); NAB Supplemental Comments at 13-14 (citing various commenters explaining the "middle market" gap in financing radio transactions).

[230] Letter from David Honig, President, MMTC, MB Docket No. 13-50 (Apr. 15, 2013). The Coalitions expressed doubt about one commenter's (Grant Co. Broadcasters) discussion of the difficulty, if not near impossibility, of financing more modestly-sized broadcast transactions, Coalition Reply Comments at 25, but many broadcast and other commenters, including women and minorities, in other ownership-related proceedings have clearly confirmed that as a serious problem.

makes it even more difficult for mid-sized and small broadcasters and new entrants, especially women and minorities, to obtain needed capital to acquire or improve stations.[231]

Given the failure of ownership limits to successfully foster minority/female station ownership for 80 years, the virtually universal agreement that lack of access to capital is the primary impediment to greater ownership diversity, and the inability of commenters to explain how maintaining the current ownership caps – which do not increase new entrants' or small broadcasters' access to capital – will somehow in the future promote diverse ownership, the Commission cannot rationally retain the existing ownership rules on the basis of fostering ownership diversity. Instead, the FCC's focus here should be on measures that increase the radio industry's competitiveness, thereby encouraging investment and availability of capital. As the Commission recognized during the last quadrennial review, "[t]o the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law," any such action should not "be in the form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees."[232]

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For the reasons set forth above, NAB urges the FCC to reject unmeritorious claims that reforming the outdated local ownership caps is not necessary for, or beneficial to, the radio industry as a whole and to modernize its radio rule forthwith. The Commission has no valid legal, competitive, or factual basis for continuing to retain the existing analog-era radio ownership limits.

Respectfully submitted,

Rick Kaplan
Chief Legal Officer and Executive Vice President
Legal and Regulatory Affairs

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[231] *See*, *e.g.*, BIA Broadcast Financing Letter at 2 (explaining that "[i]t is difficult for even established broadcast owners, especially radio, to raise equity and debt financing in this competitive environment . . . First-time owners face daunting, if not nearly insurmountable, odds in obtaining financing"); Letter from Lyle Banks to Marlene H. Dortch, FCC, MB Docket No. 17-289, at 2 (June 6, 2018) (minority broadcaster stating that he had divested his two TV stations due to the high cost of capital and lack of options for accessing less expensive capital); NAB Supplemental Comments at 11-14.

[232] 2014 Quadrennial FNPRM, 29 FCC Rcd at 4456-57 (rejecting claims that proposed modifications to newspaper/broadcast cross-ownership rule would adversely affect minority and female ownership levels).

Attachment A

Nos. 19-1231 & 19-1241

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPENING BRIEF FOR INDUSTRY PETITIONERS

EVE KLINDERA REED
JEREMY J. BROGGI
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20036
(202) 719-7000

Counsel for Petitioner Nexstar Inc. f/k/a Nexstar Broadcasting, Inc.

HELGI C. WALKER
Counsel of Record
JACOB T. SPENCER
MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
hwalker@gibsondunn.com

Counsel for Petitioner National Association of Broadcasters

[Additional counsel listed on signature page]

QUESTION PRESENTED

Section 202(h) of the Telecommunications Act of 1996 directs the Federal Communications Commission to review its media ownership rules every four years and to "repeal" or "modify" any rule that is no longer "necessary in the public interest as the result of competition." In the Commission's most recent review, the agency modified or eliminated several decades-old ownership rules that substantial competitive changes in the media marketplace rendered unnecessary. No party challenged the Commission's statutorily mandated competition analysis, nor did the Third Circuit question it on the merits. Yet the Third Circuit concluded that the Commission inadequately considered the effect of those changes on minority and female ownership—even though Section 202(h) says nothing about that issue. On that ground alone, the Third Circuit vacated all the Commission's rule changes (as well as other agency actions in these consolidated cases) and ordered the agency to collect additional statistics on ownership diversity. The same divided Third Circuit panel has repeatedly elevated its policy concerns over the statutory text and purported to retain jurisdiction over the FCC's Section 202(h) orders, effectively blocking review by any other court for more than 15 years.

The question presented is:

Whether under Section 202(h) the Commission must produce and consider statistical evidence or conduct an in-depth theoretical analysis regarding effects on minority and female ownership before repealing or modifying media ownership rules that it determines are no longer "necessary in the public interest as the result of competition."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are the Federal Communications Commission, the United States of America, Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, the National Association of Broadcasters, News Corporation, News Media Alliance, Nexstar Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc.

Respondents that were petitioners in the Third Circuit are Prometheus Radio Project, Media Mobilizing Project, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America, Common Cause, Multicultural Media, Telecom and Internet Council, National Association of Black Owned Broadcasters, Inc., Independent Television Group, and Free Press.

Respondent that was intervenor petitioner in the Third Circuit is Cox Media Group LLC.

Respondents that were intervenor respondents in the Third Circuit are Benton Foundation and National Organization for Women Foundation.

Pursuant to this Court's Rule 29.6, Petitioners state that:

Bonneville International Corporation is a privately held Utah corporation. Bonneville's sole shareholder is Deseret Management Corporation, which, in turn, is privately held by the DMC Reserve Trust. There are three individual trustees, who are appointed by The First Presidency of The Church of Jesus Christ of Latter-day Saints.

Connoisseur Media LLC is a limited liability company organized in the State of Delaware. Connoisseur is owned by Connoisseur Media Holdings, LLC, which is in turn controlled by CM Broadcast Management, LLC.

Fox Corporation, a Delaware publicly held corporation, is a news, sports, and entertainment company that produces and delivers content through its primary brands, including FOX News Media, FOX Sports, FOX Entertainment, and FOX Television Stations. Based upon a review of Schedule 13D and Schedule 13G filings with the Securities and Exchange Commission, Fox Corporation is not aware of any publicly held company owning 10 percent or more of its total stock, i.e., Class A and Class B on a combined basis.

National Association of Broadcasters is a nonprofit, incorporated association of radio and television stations and broadcast networks. It has no parent company, and has not issued any shares or debt securities to the public; thus, no publicly held company owns ten percent or more of its stock.

News Corporation is a publicly held company consisting of businesses across a range of media, including news and information services, book publishing, and digital real estate services. It has no parent company, and no publicly held company owns ten percent or more of News Corporation's stock.

News Media Alliance is a not-for-profit trade association representing nearly 2,000 companies engaged in all aspects of the news media industry in the United States and Canada. Alliance members account for nearly 90 percent of the daily newspaper circulation in the United States, as well as a range of online, mobile and non-daily publications. News

Media Alliance was known as the Newspaper Association of America until September 2016. News Media Alliance has no parent company, and no publicly held company has a ten percent or greater ownership interest in the News Media Alliance.

Nexstar Inc., formerly known as Nexstar Broadcasting, Inc., is a media corporation that owns and operates commercial broadcast television stations. Nexstar is wholly owned by Nexstar Media Group, Inc., which is a publicly held corporation. No publicly held corporation has a ten percent or greater ownership interest in the stock of Nexstar Media Group, Inc.

The Scranton Times L.P. is controlled by its general partner, The Times Partner, L.L.C., a Pennsylvania limited liability company, which is in turn privately held and controlled by its four individual members.

Sinclair Broadcast Group, Inc. is a media corporation that owns, operates, and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly traded company owns more than ten percent of Sinclair's stock.

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BRIEF FOR INDUSTRY PETITIONERS

Petitioners the National Association of Broadcasters, Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, News Corporation, News Media Alliance, Nexstar Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc. (collectively, "Industry Petitioners") respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

OPINIONS BELOW

The opinion of the Third Circuit (Pet.App.1a-63a) is reported at 939 F.3d 567.[1] The order of the Third Circuit denying rehearing (Pet.App.311a-14a) is unreported. The orders of the Federal Communications Commission under review in this Court (JA101-576; Pet.App.64a-310a; JA577-704) are reported at 31 FCC Rcd. 9864, 32 FCC Rcd. 9802, and 33 FCC Rcd. 7911.

JURISDICTION

The Third Circuit entered judgment on September 23, 2019, and denied a timely petition for rehearing on November 20, 2019. On February 12, 2020, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2020. On March 12, 2020, Justice Alito further extended the time for filing a petition for a writ of certiorari to and including April 18, 2020. On March 19, 2020, this Court issued a standing order that also extended the time for filing a petition for a writ of certiorari to and including April 18, 2020. The petition for a writ of

[1] "Pet.App." refers to the petition appendix in No. 19-1241.

certiorari was filed on April 17, 2020, and granted on October 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004), provides:

SEC. 202. BROADCAST OWNERSHIP.

* * *

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[2]

STATEMENT

In 1996, Congress enacted Section 202(h) to achieve "regulatory reform" of the rules limiting the ownership of our nation's broadcast outlets and newspapers—rules that trace back to the 1940s, when black-and-white television sets were a novelty. To that end, Congress required the Federal Communications Commission ("FCC" or

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[2] The Act originally required biennial review but was later amended to mandate quadrennial review. *See* Pub. L. No. 108-199, § 629(3), 118 Stat. at 100.

"Commission") to regularly review its rules restricting ownership of television stations, radio stations, and newspapers, and to "repeal" or "modify" any regulation that is no longer "necessary in the public interest as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act"). Despite Congress' clear command that the FCC modernize its ownership rules by eliminating outdated restrictions, a single panel of the Third Circuit has blocked the FCC's efforts to fulfill its statutory duty for more than 15 years.

As a result, the media ownership rules have remained stuck in the past. When Congress enacted Section 202(h), the rules were already relics from a time when traditional television and radio broadcasts dominated video and audio entertainment and, along with print newspapers, were virtually the only means by which Americans received news. By 1996, revolutionary technological changes had sparked an "explosion of video distribution technologies and subscription-based programming sources that gave consumers new media options, including cable and satellite television, and challenged the dominance of newspapers and "free over-the-air broadcasting." H.R. Rep. No. 104-204, at 55 (1995). Congress instructed the FCC to implement periodic "regulatory reform reviews" to ensure that its rules keep pace with these significant competitive changes. Since then, the Internet has dramatically increased the public's information and entertainment options, and competition in the media marketplace only continues to grow.

Despite Congress' mandate and the ever-evolving media landscape, the FCC's long-outdated rules are still in force because the same divided panel of the

Third Circuit has—time and again—prevented the FCC from implementing the reforms Section 202(h) requires. *See* Pet.App.46a (Scirica, J., dissenting).[3] In the *Reconsideration Order* under review, the FCC made critical adjustments to its ownership rules by repealing certain provisions and modifying others that the FCC concluded no longer served the public interest in light of "dramatic changes in the marketplace." Pet.App.67a (alteration omitted). The Third Circuit, however, vacated the *Reconsideration Order* in its entirety, thus reinstating *all* the prior rules. Pet.App.41a.

The Third Circuit's decision was not based on the rules' perceived merits or any defect in the competition analysis Congress directed the FCC to perform; in fact, no party disputed any aspect of that analysis or the FCC's overarching conclusion that the rules no longer served the public interest in light of competition. Instead, the Third Circuit's decision was based solely on atextual policy concerns about the gender and racial makeup of broadcast station owners.

Specifically, the Third Circuit faulted the Commission for failing to produce more robust statistical or in-depth theoretical analysis of how the *Reconsideration Order*'s rule changes would affect minority and female ownership. That holding finds no support in Section 202(h) or any principle of administrative law. Congress explicitly directed the

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[3] *See Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 472 (3d Cir. 2011) ("*Prometheus II*") (Scirica, J., dissenting); *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 435 (3d Cir. 2004) ("*Prometheus I*") (Scirica, C.J., dissenting); *see also Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 60 (3d Cir. 2016) ("*Prometheus III*") (Scirica, J., dissenting).

Commission to consider *competition*, not minority and female ownership, in conducting Section 202(h) reviews. Congress knows how to direct the Commission to consider minority and female diversity, and did so elsewhere in the Communications Act, but not in Section 202(h).

Citing no statutory authority, the Third Circuit elevated policy preferences about ownership diversity above Congress' express competition-based command. The panel majority transformed minority and female ownership into not just a *mandatory* consideration in the FCC's Section 202(h) reviews, which was itself error under the statute, but a *dispositive* threshold requirement in such reviews, which was further error. Under the Third Circuit's decision, no matter what the Commission concludes about the necessity of its rules in light of competition, it cannot change those rules without sufficiently compelling empirical evidence or in-depth theoretical analysis about the prospective effect of the changes on minority and female ownership.

In vacating the *Reconsideration Order* on that basis, the Third Circuit once again prevented the FCC from bringing its archaic ownership rules into the modern age, obstructing the ability of newspapers and local broadcasters to compete in today's media marketplace. Industry Petitioners support the goal of advancing minority and female ownership of broadcast stations, and some have advocated for programs to do just that. But that goal was not one Congress required the Commission to consider in Section 202(h), and it thus cannot be invoked as the sole reason to prevent the Commission from updating ossified rules that harm the newspaper and broadcast industries—and ultimately the American public.

This Court should reverse the judgment below, instruct the Third Circuit to deny Respondents' petitions for review, and allow the Commission's rule changes finally to take effect.

A. Congress Mandates Periodic "Regulatory Reform Review" Of Media Ownership Rules.

The Commission's rules restrict ownership of multiple television or radio stations, as well as "cross-ownership" of different types of media outlets, in local markets. *See* 47 C.F.R. § 73.3555. Section 202(h) requires the FCC to assess those rules every four years "as part of . . . regulatory reform review" to determine whether they "are necessary in the public interest as the result of competition," and provides that the agency "shall repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, § 202(h).

Despite seismic shifts in the competitive landscape of the media industry, these FCC ownership rules have remained virtually unchanged for decades. Today, they exist as relics from a time when Americans had access to a very limited number of sources of information, and ownership regulations were designed to manage the perceived scarcity of radio spectrum, *see Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 376 (1969), by preventing undue economic concentration and promoting viewpoint diversity. The FCC first adopted structural ownership rules in the 1940s. *See Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 194-96 (1943). And it promulgated the Newspaper/Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d), which prohibits an entity from owning a daily newspaper and a single full-power radio or television station in the same geographic market, in 1975. *See In re Amend. of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1075 (1975).

By 1996, technological innovation had rendered that regulatory approach obsolete. "On the cusp of an unprecedented revolution in communication technologies, Congress set in motion [a] statutorily-prescribed process of media deregulation based on the conviction that increased competition in the media marketplace would best serve the public interest." *Prometheus I*, 373 F.3d at 438 (Scirica, C.J., dissenting). Congress recognized that in this newly "competitive environment, arbitrary limitations on broadcast ownership" were "no longer necessary" to protect consumers and instead were harmful to "the industry's ability to compete effectively in a multichannel media market." H.R. Rep. No. 104-204, at 55.

The solution, Congress determined, was to adopt a plan for regulatory reform compelling the FCC "to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces." H.R. Rep. No. 104-204, at 55. Congress kicked off this process by specifically directing the relaxation or elimination of several media ownership rules. *See* 1996 Act, § 202(a), (b), (c)(1), (e), (f)(1), (i). And it enacted Section 202(h) to ensure that the FCC would continue to update its rules to reflect ongoing technological change and increased competition. In sum, Congress enacted a deregulatory provision designed to free broadcast stations and newspapers from regulatory burdens that hindered their ability to compete in the modern media marketplace. *See Fox*

TV Stations, Inc. v. *FCC*, 280 F.3d 1027, 1044 (D.C. Cir.) (likening the "deregulation ... mandate" of § 202(h) "to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')"), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Cellco P'ship* v. *FCC*, 357 F.3d 88, 89-99 (D.C. Cir. 2004) (explaining that the parallel provision in Section 11 of the 1996 Act establishes a "deregulatory presumption").

Despite Congress' mandate that the FCC's structural ownership rules accurately reflect the *current* media marketplace—and not the marketplace that existed decades ago when the rules were adopted—many antiquated restrictions remain in place today. The Newspaper/Broadcast Cross-Ownership Rule, for example, remains exactly the same as when it was first promulgated more than *45 years ago*. Similarly, local television ownership limits from the last century remain in force, despite vastly greater competition from other video services. *See* Pet.App.146a-47a. The FCC has repeatedly acknowledged that the media landscape has rapidly and radically evolved, most recently because "the Internet has transformed the American people's consumption of news and information." *E.g.*, Pet.App.92a-98a.

These outdated restrictions harm the newspaper and broadcast industries—and the American public. For example, broadcast stations and newspapers face significant online competition for audiences and advertising dollars, competition that did not exist when the rules were adopted. *See*, *e.g.*, Pet.App.98a-100a & n.80; *cf.* Pet.App.152a. As a result of that competition, "print newspaper advertising revenue ha[s] decreased more than 50 percent since 2008 and nearly 70 percent since 2003," while digital advertising has failed to compensate for those losses. Pet.App.99a; *see also* Pet.App.94a-97a. This revenue drop has hampered newspapers' ability to invest in their newsrooms. *See* Pet.App.99a ("newsroom employees were one-third fewer than at their peak in 1989"); *cf.* Pet.App.152a (noting that small and mid-sized markets in particular have "less advertising revenue to fund local [television] programming"). Moreover, 175 newspapers ceased publication between 2007 and 2010, with another 152 closures in 2012, and 114 closures in 2013. Pet.App.100a. The industry might have been able to avert many of these cut-backs and closures through efficiency-maximizing transactions, if those deals were not prohibited by ancient rules that still apply in a marketplace for which they are entirely unsuited.

B. The Third Circuit Blocks Much-Needed Regulatory Reform For More Than Fifteen Years.

Over the last two decades, the FCC has attempted to modernize its broadcast ownership rules through its statutorily mandated regulatory reform reviews. Yet on multiple occasions, starting in 2004, the same divided panel of the Third Circuit has prevented the FCC from doing so. Along the way, the Third Circuit has transformed the non-statutory policy goal of promoting minority and female ownership into the controlling factor in the FCC's reviews.

1. In its 2002 review, for example, the Commission decided to repeal the Newspaper/Broadcast Cross-Ownership Rule and replace it with cross-media limits that varied based on the size of the relevant market. *See Prometheus I*, 373 F.3d at 387, 397-98. That Rule was no longer

necessary, the FCC concluded, because—among other reasons—it "undermines localism by preventing efficient combinations that would allow for the production of high-quality local news." *Id.* at 398. In other words, a newspaper and a broadcast station working together can produce more—and better—local news and programming than either could alone. On review, the Third Circuit *agreed* "that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." *Id.*

The FCC also modified its Local Television Ownership Rule to permit ownership of more than one station in most markets, with up to three stations in the largest markets. *Prometheus I*, 373 F.3d at 386-87. The Third Circuit again "agree[d] with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets" and accepted the FCC's determination that common ownership of television stations could benefit localism. *Id.* at 414-16. Nonetheless, the divided panel vacated and remanded the FCC's deregulatory reforms because it identified certain flaws in the analysis underlying the replacement limits. *See id.* at 402-12, 435.

With one exception, the Third Circuit did not address minority and female ownership in its review of the Commission's 2002 actions. That exception concerned the Failed Station Solicitation Rule—a narrow provision applying only to certain rules involving television stations—which the Commission had attempted to repeal. *See Prometheus I*, 373 F.3d at 420.[4] The FCC originally adopted this Rule "to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled—and consequently more affordable—[television] stations were for sale." *Id.* But in repealing the Rule, the Commission "fail[ed] to mention anything about the effect this change would have on potential minority station owners." *Id.* The Third Circuit vacated and remanded based on the general administrative law principle that an agency acts arbitrarily and capriciously when it changes a previously adopted policy position without acknowledging that it is doing so and offering a rational explanation for the change. *See id.* at 421. *But see id.* at 474 n.126 (Scirica, C.J., dissenting). But the Third Circuit did not purport to base its holding that the FCC must consider minority and female ownership diversity before repealing the Failed Station Solicitation Rule on any requirement in Section 202(h) or any other provision of the Communications Act.

The divided panel announced that it would "retain[ ] jurisdiction" over issues it remanded to the FCC, and stated—in a footnote—that the Commission "should also consider" specific "proposals for enhancing ownership opportunities for women and minorities." *Prometheus I*, 373 F.3d at 435 & n.82.

2. In its 2006 review, the FCC tried again to reform the Newspaper/Broadcast Cross-Ownership Rule, this time amending the Rule to review cross-ownership proposals on a case-by-case basis. *See Prometheus II*, 652 F.3d at 440-41. Once again, the

[4] The Failed Station Solicitation Rule requires waiver applicants to provide notice to out-of-market buyers before selling failing or failed stations to in-market buyers. *See* 47 C.F.R. § 73.3555 n.7.

same divided Third Circuit panel vacated the Commission's attempted reform, not because it found that the Rule was necessary in light of competition, but because the FCC supposedly failed to provide proper notice of its rule changes. *See id.* at 453. Once again, Judge Scirica dissented from the majority's decision to "preserve[ ] an outdated and twice-abandoned ban." *Id.* at 472 (Scirica, J., dissenting). And once again, also over Judge Scirica's dissent, the panel declared that it would "retain[ ] jurisdiction over the remanded issues." *Id.* (majority opinion); *see also id.* at 473 (Scirica, J., dissenting).

At the same time, the Third Circuit also reviewed a separate Commission order—the *Diversity Order*—that had adopted a series of measures to address minority and female ownership issues following the Third Circuit's first remand.[5] Most of those measures were "designed to expand opportunities for 'eligible entities,'" defined to mean small businesses. *Prometheus II*, 652 F.3d at 468. The Commission adopted this race- and gender-neutral definition based on concerns about "how proposals regarding minority and female ownership 'would satisfy constitutional standards' in light of the Supreme Court's ruling in *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200 (1995)." *Id.* at 467-68 (citations omitted). But the Third Circuit vacated all measures incorporating that definition because the FCC had "offered no data attempting to show a connection between the definition chosen and the goal of the

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[5] *See In re Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922 (Dec. 18, 2007). The Third Circuit had consolidated its review of the *Diversity Order* with review of the FCC order concluding the 2006 ownership review.

measures adopted—increasing ownership of minorities and women." *Id.* at 471.

In reviewing the *Diversity Order*, the panel majority generally criticized the FCC for failing "to consider the effect of its rules on minority and female ownership." *Prometheus II*, 652 F.3d at 471. Although the panel said that "ownership diversity is an important aspect of the overall media ownership regulatory framework," it did not cite any authority for the proposition that the Commission must consider minority and female ownership as part of its Section 202(h) reviews. *Id.* at 472. Instead, the panel stated that its own "prior remand" had directed "the Commission to consider the effect of its rules on minority and female ownership," *id.* at 471, referring back to its remand of the FCC's repeal of the Failed Station Solicitation Rule, *see id.* at 465-66.

3. The Commission failed to complete its 2010 review in a timely fashion. *See Prometheus III*, 824 F.3d at 38. On review of the FCC's inaction, the same Third Circuit panel majority "remind[ed] the Commission of its obligation to complete its Quadrennial Review responsibilities," *id.* at 60, and cited the Newspaper/Broadcast Cross-Ownership Rule as "a telling example of why the delay [wa]s so problematic," *id.* at 51. Because of the court's two prior decisions, it explained, "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest." *Id.* "This has come at significant expense to parties that would" otherwise be able "to engage in profitable combinations." *Id.* at 51-52.

In a footnote, the panel majority "note[d] that, in addition to § 202(h)'s requirement to review the rules to see if they are necessary in light of competition, the

Quadrennial Review must also, per our previous decisions, include a determination about 'the effect of [the] rules on minority and female ownership.'" *Prometheus III*, 824 F.3d at 54 n.13 (second alteration in original). Again, the panel did not cite any authority other than its own prior decisions for this supposed mandate.[6] The panel admonished that "'[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough,'" and "[f]or the Commission's stalled efforts to promote diversity in the broadcast industry, that time has come." *Id.* at 37 (first alteration in original; citation omitted). And, for the third time, the "panel retain[ed] jurisdiction over the remanded issues." *Id.* at 60.

C. The FCC Adopts The *Reconsideration Order*.

In 2016, the FCC concluded its 2010 and 2014 reviews but failed to adopt reforms to address the seismic marketplace changes that had occurred over the past decades. *See* JA101-576 (the "*Second R&O*"). Despite a well-developed record demonstrating the need for deregulation due to increased competition, the FCC maintained several legacy ownership restrictions—including the Newspaper/Broadcast Cross-Ownership Rule—and even *increased* restrictions on local television ownership.[7]

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[6] By contrast, in the panel's separate discussion of the eligible-entity definition, it cited 47 U.S.C. § 309(i) and (j) as imposing "a statutory obligation to promote minority and female broadcast ownership." *Prometheus III*, 824 F.3d at 40-41.

[7] In the *Second R&O*, the Commission also readopted the "eligible entity" definition that the Third Circuit had vacated in *Prometheus II*. JA378. The Commission acknowledged that the definition had not been shown to promote minority and female

Given the still-pressing need for regulatory reform, Petitioners National Association of Broadcasters, Nexstar, and Connoisseur petitioned the FCC for reconsideration. They explained that the record was devoid of studies, serious research, or new arguments showing why the decades-old ownership rules should remain in place; that the Commission's retention of these archaic rules failed to account for the rise of alternative media providers, including cable, satellite, and the Internet; and that the rules as applied fundamentally misunderstood the actual workings of the media marketplace and hampered broadcasters' ability to compete.

The FCC agreed, and granted the reconsideration petitions in part in 2017. The *Reconsideration Order* repealed the Newspaper/Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d), the Radio/Television Cross-Ownership Rule, *id.* § 73.3555(c),[8] and the TV Joint Sales Agreement Attribution Rule, *id.* § 73.3555 n.2(k)(2).[9] Pet.App.76a-77a, 193a-95a. The FCC also modified the Local Television Ownership Rule, 47 C.F.R. § 73.3555(b), but maintained its prohibition on

ownership, but explained that the definition would promote ownership by small businesses and new entrants, another FCC policy goal. *See* JA375-76, 378-79.

[8] The Radio/Television Cross-Ownership Rule restricts certain common ownership of radio and television stations in local markets. Pet.App.122a-24a.

[9] A joint sales agreement "is an agreement that authorizes one station (the broker or the brokering station) to sell some or all of the advertising time on another station (the brokered station)." Pet.App.179a. Under the TV Joint Sales Agreement Attribution Rule, a station in a joint-sales-agreement relationship is considered for purposes of the Local Television Ownership Rule to be owned by the party selling the advertising time.

common ownership of higher-rated stations. Pet.App.140a. And the FCC established a modest presumptive waiver of the Local Radio Ownership Rule, 47 C.F.R. § 73.3555(a), for parties seeking approval of a limited number of transactions involving radio stations in markets that contain multiple "embedded" markets (i.e., New York City and Washington, D.C.). Pet.App.175a-78a.

The FCC found that these revisions were necessary to ensure that broadcasters and newspapers have "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." Pet.App.67a. For example, the Commission explained that it had originally adopted the Newspaper/Broadcast Cross-Ownership Rule "primarily to promote viewpoint diversity" in a "marketplace containing a very limited number of speakers." Pet.App.77a-78a. Indeed, promoting viewpoint diversity is now "the sole support for the [R]ule," since it "is not necessary to promote the goals of competition or localism, and may even hinder localism." Pet.App.81a-82a. Yet in "today's competitive media environment"—with an ever-expanding number of speakers—any remaining benefits to viewpoint diversity are minimal. Pet.App.78a. And because the Rule "is not necessary to promote the Commission's policy goals of viewpoint diversity, localism, and competition," it no longer "serve[s] the public interest." Pet.App.86a.

Conforming on remand to the Third Circuit's directive to consider the effect of the ownership rules on minority and female ownership, the FCC specifically determined that none of the changes to its rules would have a material impact on ownership diversity. Pet.App.117a-22a, 138a-40a, 161a-62a.

Moreover, the Commission concluded that it could not "justify retaining" its ownership rules "under Section 202(h) based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." Pet.App.140a; *accord* Pet.App.162a ("Under Section 202(h), however, we cannot continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership.").

In a separate order, and at the urging of certain Industry Petitioners, the Commission adopted a new "incubator program" designed to encourage new entrants, including minorities and women, in acquiring and successfully operating broadcast stations. JA577 (the "*Incubator Order*"). The program provides a waiver of the Local Radio Ownership Rule for established broadcasters who provide financial and operational support to new entrants. JA582-85. To qualify as a "new entrant," an entity must have no or very few broadcast outlets and also be a small business. JA592-612. The Commission noted that similar new entrant criteria had helped increase access for minorities and women in bidding for initial broadcast licenses, while avoiding constitutional concerns by taking a race- and gender-neutral approach. *See* JA598-603, 605 & n.55.

D. The Third Circuit Again Blocks Critical Regulatory Reform.

On September 23, 2019, the same divided Third Circuit panel vacated the *Reconsideration Order* in its entirety, thereby nullifying the product of the Commission's 2010 and 2014 reviews. *See* Pet.App.41a. The panel did not criticize any aspect of the FCC's competition analysis; indeed, no party challenged "the FCC's core determination that the ownership rules have ceased to serve the 'public interest.'" Pet.App.55a (Scirica, J., dissenting). Instead, the panel majority faulted the Commission solely for failing to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." Pet.App.34a (majority opinion).

The Third Circuit proclaimed that "promoting ownership diversity" is "something the Commission must consider" and is "an important aspect of the problem." Pet.App.41a. Yet the Third Circuit once again cited no authority—other than the panel's own prior statements—in support of the proposition that minority and female ownership is a required, much less a dispositive, factor in the FCC's Section 202(h) reviews. *See* Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13).

Nonetheless, the panel majority ordered the Commission on remand to "ascertain on record evidence the likely effect of any rule changes it proposes . . . on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." Pet.App.41a. It vacated *all* of the Commission's rule changes, including the embedded radio markets waiver (which no party challenged before the Commission or the Third Circuit) and the TV Joint Sales Agreement Attribution Rule (which no Respondent mentioned in its opening Third Circuit brief). *See id.* It also vacated the *Incubator Order* and the *Second R&O*'s eligible-entity definition without explanation. *Id.* And it again "retain[ed] jurisdiction over the remanded issues." Pet.App.45a.

Once again, Judge Scirica dissented. Pet.App.46a. He explained that "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments." Pet.App.55a. And he noted that "neither Section 202(h) nor the [Administrative Procedure Act ('APA')] requires the FCC to quantify the future effects of its new rules as a prerequisite to regulatory action." *Id.* In assessing the public interest under Section 202(h), he reasoned, "the FCC considers five types of diversity, not to mention competition and localism." Pet.App.59a. "The FCC's lack of some data relevant to one of these considerations," he concluded, "should not outweigh its reasonable predictive judgments, particularly in the absence of any contrary information, such that its entire policy update is held up." *Id.*

SUMMARY OF THE ARGUMENT

The Third Circuit erred by vacating the *Reconsideration Order* based solely on its conclusion that the Commission did not adequately consider the effect of the *Order*'s rule changes on minority and female ownership. Section 202(h) does not require the Commission to consider that factor. Nor does any principle of administrative law support the Third Circuit's judgment. Accordingly, this Court should reverse the judgment below, instruct the Third Circuit to deny the petitions for review of the *Order*, and permit the Commission's changes to its long-outdated ownership rules to take effect.

I. The *Reconsideration Order* fulfilled the Commission's statutory duties under Section 202(h). Congress instructed the FCC to review its media ownership rules and to repeal or modify rules that are no longer necessary in light of competition. That is precisely what the Commission did.

A. Section 202(h) requires the Commission to consider competition, not minority and female ownership. The plain text of the statute establishes a deregulatory presumption requiring the FCC to "repeal or modify" any rule that is no longer "necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). That command is clear on its face and consistent with other pro-competitive, deregulatory provisions of the 1996 Act.

In contrast with the specific requirement to consider competition, Section 202(h) does not expressly instruct the Commission to consider minority and female ownership. Congress knows how to direct the FCC to consider minority and female diversity—as evidenced by other parts of the Communications Act that contain such requirements—but plainly did not do so in Section 202(h).

Nor does Section 202(h) implicitly require the Commission to consider minority and female ownership. Although the statute refers to "the public interest," that phrase must be interpreted "by its context." *Nat'l Broad. Co.*, 319 U.S. at 216. No historical or statutory context suggests that "the public interest," as used in Section 202(h), compels the Commission to consider minority and female ownership. Historically, this Court and the Commission interpreted the public interest—in the specific context of structural ownership rules—to include competition, localism, and viewpoint diversity, *not* minority and female ownership. And among those factors, Congress selected competition as the primary focus of Section 202(h).

B. The Third Circuit contravened Section 202(h) by requiring the Commission to consider minority and female ownership, based solely on language from its own opinions. None of those opinions identified any statute or regulation compelling the Commission to consider minority and female ownership in its Section 202(h) reviews. Indeed, the Third Circuit recognized in *Prometheus III* that its instruction was an "addition to § 202(h)'s requirement." 824 F.3d at 54 n.13.

The Third Circuit thus erred by considering whether the *Reconsideration Order* adequately addressed judge-made policy concerns instead of asking whether the *Order* fulfilled Section 202(h)'s requirements. The *Order* undisputedly complied with the statute. The Commission reviewed its ownership rules, concluded that they were no longer necessary in light of current competitive conditions, and thus repealed or modified them, as it was statutorily bound to do. Because "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments" or even challenged its "core determination that the ownership rules have ceased to serve the 'public interest,'" Pet.App.55a (Scirica, J., dissenting), the Third Circuit should have upheld the *Order*.

II. Notwithstanding the lack of any statutory requirement to consider minority and female ownership, the Third Circuit declared that factor an "important aspect of the problem" that the Commission must "consider" in Section 202(h) reviews under *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). Pet.App.41a. The Third Circuit then vacated the *Reconsideration*

Order because the FCC did not collect sufficient empirical evidence or conduct an in-depth theoretical analysis of the prospective effect of the rule changes on minority and female ownership. No principle of administrative law supports that judgment.

A. The Third Circuit's judgment cannot be justified as following from the Commission's policy goals. The Commission has sometimes included minority and female ownership as one policy goal among many that it pursues in the context of media ownership. But it has never treated ownership diversity as a mandatory factor in its Section 202(h) reviews, much less as a dispositive one. Indeed, the Commission generally did not consider minority and female ownership when reviewing its structural ownership rules under Section 202(h) until the Third Circuit ordered it to do so. Nor are agencies required to consider—let alone adopt rules promoting—every policy goal in every context. And the Commission has typically addressed minority and female ownership directly through separate initiatives such as the *Diversity Order* and the *Incubator Order*, not indirectly through its structural ownership restrictions. Thus, the APA's principle of reasoned decisionmaking did not compel the Commission to consider that factor in the *Reconsideration Order*.

B. Even if the Commission were required to consider minority and female ownership during its Section 202(h) reviews based on some past invocation of that policy, it fully satisfied any such requirement in the *Reconsideration Order*. The Commission reviewed the record evidence and reasonably predicted based on that evidence that its rule changes were unlikely to affect minority and female ownership. Given the Commission's unchallenged competitive findings and the lack of record evidence showing that loosening the rules would have any adverse effect on minority and female ownership, the Commission's conclusion that it should repeal or modify the rules was not only rational but required. The Third Circuit erred in refusing to accept that conclusion unless and until the Commission produces additional statistical evidence or theoretical analysis. *See Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990).

III. The Third Circuit compounded its errors by issuing an overbroad remedy and purporting once again to retain jurisdiction over the Commission's Section 202(h) reviews.

The Third Circuit's remedy was overbroad because it vacated not only the *Reconsideration Order*, but also the *Incubator Order* and the *Second R&O*'s eligible-entity definition, even though the only flaw the panel majority identified in the Commission's reasoning had nothing to do with those actions. Moreover, the Third Circuit vacated certain of the *Reconsideration Order*'s rule changes even though no party challenged those changes in the Third Circuit or before the Commission.

Even if the Third Circuit were correct on the merits, it should have remanded the *Reconsideration Order* to the Commission without vacatur. The Third Circuit acknowledged that the Commission could adopt the same substantive reforms after undertaking "a meaningful evaluation" of their effect on ownership diversity. Pet.App.41a. By vacating the *Reconsideration Order* and leaving archaic rules in place, the Third Circuit harmed broadcasters, newspapers, and ultimately the public by hindering the ability of traditional broadcasters and newspapers to thrive in today's media marketplace.

Finally, the Third Circuit has repeatedly overstepped its authority by retaining jurisdiction over successive Section 202(h) reviews. Congress granted subject matter jurisdiction over such reviews to all the courts of appeals (other than the Federal Circuit). 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). The panel majority's perpetual retention of jurisdiction undermines Congress' judgment and continues to distort the Commission's regulatory reform reviews.

This Court should reverse.

ARGUMENT

I. THE THIRD CIRCUIT CONTRAVENED SECTION 202(h) BY ELEVATING POLICY CONCERNS OVER THE COMPETITION ANALYSIS THAT CONGRESS SPECIFICALLY REQUIRED.

The *Reconsideration Order* fulfilled the FCC's statutory duties under Section 202(h). In that *Order*, the FCC properly determined that Section 202(h) required repeal or revision of several ownership rules because they did not reflect the competitive realities of the media marketplace and thus no longer served the public interest. No party challenged the FCC's competition analysis (or even the larger public interest conclusion), and the Third Circuit did not fault it. Instead, the Third Circuit vacated the *Reconsideration Order* solely because the Commission purportedly failed to comply with circuit precedent requiring exacting consideration of minority and female ownership diversity.

The Third Circuit's judgment cannot be squared with the statute. Section 202(h) requires the

Commission to assess its ownership rules in light of one factor and one factor only: "competition," not the effect of its rules on minority and female ownership. And Section 202(h) compels the Commission to eliminate or reform rules that cannot be justified in light of competition. It leaves no room for the Commission to retain ownership rules based on the unsubstantiated hope that those rules might promote minority and female ownership, as the Commission correctly explained, and that is doubly so when the record evidence shows that the rules inflict significant competitive harms on regulated broadcasters and newspapers. Because the Third Circuit replaced the statutory analysis Congress prescribed with its own atextual policy goals, this Court should reverse.

A. Section 202(h) Requires The FCC To Consider Competition, Not Minority And Female Ownership.

1. The text of Section 202(h) is clear. The FCC must periodically evaluate its broadcast ownership rules and "repeal" or "modify" any such rule that is no longer "in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). By the statute's plain terms, the FCC's mandate under Section 202(h) is limited to reviewing whether its ownership rules remain necessary in light of competition in the media marketplace.

This text reflects Congress' goals in enacting the 1996 Act: "To *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services" for American consumers. 1996 Act, Preamble, 110 Stat. at 56 (emphasis added). One of the means Congress chose to accomplish these goals was to "deregulate the structure of the broadcast and cable television industries" through the elimination of unnecessary ownership regulations. *Fox TV Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

Congress itself began the process of media ownership deregulation. For example, the 1996 Act "repealed the statutes prohibiting telephone/cable and cable/broadcast cross-ownership," "overrode the few remaining regulatory limits upon cable/network cross-ownership," "eliminated the national and relaxed the local restrictions upon [radio station] ownership, and eased the 'dual network' rule." *Fox TV*, 280 F.3d at 1033 (citations omitted). The 1996 Act also directed the FCC to revise its regulations to "eliminate the [national] cap upon the number of television stations any one entity may own, and to increase to 35 from 25 the maximum percentage of American households a single [television] broadcaster may reach." *Id.* (citations omitted); *see also Prometheus I*, 373 F.3d 372, 383-85 (3d Cir. 2004) (cataloguing changes).

Section 202(h) is the capstone of this deregulatory effort. In recognition of the ever-evolving nature of competition, Congress instructed the FCC "to continue the process of deregulation" by reviewing each of its ownership rules every four years to "'determine whether any of such rules are necessary in the public interest as the result of competition'" and to "'repeal'" or "'modify'" those that are not. *Fox TV*, 280 F.3d at 1033-34 (quoting 1996 Act, § 202(h)). That command is clear on its face. And when read against the backdrop of the ownership changes that Congress itself made or directed in the 1996 Act, it becomes even more evident that these periodic reviews were designed to ensure that deregulatory actions "would keep pace with the competitive changes in the marketplace." *Prometheus I*, 373 F.3d at 391; *see Prometheus III*, 824 F.3d 33, 50 (3d Cir. 2016).

Further confirming the statute's focus on competition and deregulation, Congress expressly linked the Section 202(h) reviews with the FCC's broader "regulatory reform review under section 11 of the Communications Act." 1996 Act, § 202(h). Section 11 was also added by the 1996 Act to ensure that the FCC reviews periodically its regulations governing telecommunications services to "determine whether any such regulation is no longer necessary in the public interest *as the result of meaningful economic competition*" and to "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161 (emphasis added). By thus firmly placing Section 202(h) reviews within the context of the 1996 Act's "pro-competitive, de-regulatory national policy framework," S. Rep. No. 104-230, at 1-2 (1996), Congress again confirmed that the statutory text is focused on competition, with an eye toward real, ongoing regulatory reform.

2. In contrast with the explicit statutory requirement that the FCC assess "competition," there is no express textual mandate that the FCC consider minority or female ownership in evaluating whether its media ownership rules must be repealed or modified. Neither Section 202(h) nor any other statutory provision directs the FCC to consider this type of diversity in its Section 202(h) reviews.

The omission of race and gender from Section 202(h) is significant. "It is a fundamental principle of statutory interpretation that 'absent provisions cannot be supplied by the courts.'" *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360-61 (2019) (brackets and citation omitted); *see also Nichols* v. *United States*, 136 S. Ct.

1113, 1118 (2016) ("To supply omissions transcends the judicial function." (citation omitted)). And that is particularly true where "Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske*, 140 S. Ct. at 361. Where congressional instruction "to consider" a particular factor "has elsewhere, and so often, been expressly granted," this Court has "refused to find" the existence of the same factor "implicit in ambiguous sections" of the statute. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

Congress can and does direct the FCC to consider minority and female ownership diversity when it wishes to do so. For example, when Congress authorized the FCC to auction initial spectrum licenses prior to the 1996 Act, it expressly instructed the agency to "consider the use of . . . bidding preferences" for "minority groups and women." 47 U.S.C. § 309(j)(1), (4)(D); *see* Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993) (enacting Section 309(j)). But Congress expressly limited those diversity preferences to auctions for initial spectrum licenses, and thus they have no relevance to Section 202(h). *See* 47 U.S.C. § 309(j)(6) ("Nothing in this subsection . . . shall . . . affect the requirements of . . . any other provision of this chapter.").

The lottery system for the provision of certain initial broadcast licenses embodied a similar congressional command. There, Congress instructed the FCC to provide a "significant preference" for applicants "controlled by a member or members of a minority group." 47 U.S.C. § 309(i)(3)(A). Although that authority as related to commercial broadcast licenses terminated in 1997 (and thus before the FCC was obligated to begin its first Section 202(h) review), *id.* §§ 309(i)(5), 397(6), it provides additional evidence that when Congress wants to require the FCC to take actions related to minority ownership of licenses, Congress says so.[10]

Because Congress plainly knows how to direct the FCC to consider minority and female ownership issues, there is no ground to "enlarge[ ]" Section 202(h) to encompass "what was omitted" by Congress. *Nichols*, 136 S. Ct. at 1118.

3. Nor can Section 202(h)'s generalized reference to "the public interest" be interpreted as an implicit mandate that the FCC consider minority or female ownership diversity in its regulatory reform reviews.

In upholding Congress' broad delegation of authority to regulate media ownership in "the public interest" against a non-delegation challenge in *National Broadcasting Co.* v. *United States*, this Court explained that the Commission was "not left at large in performing this duty." 319 U.S. 190, 216 (1943). Rather, the statutory "requirement" to regulate in the public interest must "be interpreted by its context." *Id.* Neither the historical context of Section 202(h) nor the immediate statutory context

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[10] The limited applicability of the diversity preferences authorized by Section 309(i) and (j) is confirmed by Sections 309(k) and 310(d), which govern the renewal and transfer, respectively, of broadcast licenses. Those provisions prohibit the FCC, when evaluating license renewal applications and proposed transfers of licenses, from considering whether the public interest would be better served by granting the license to a person other than the renewal applicant or the proposed transferee. 47 U.S.C. §§ 309(k)(4), 310(d). Thus, even where Congress directed the Commission to promote minority and female ownership of licenses, it did so expressly and in a carefully limited fashion.

suggests that the "public interest" as used in that provision requires the Commission to consider minority and female ownership.

The statutory phrase "the public interest" had a well-known legal meaning when Congress enacted Section 202(h) in the 1996 Act. For decades, this Court and the FCC had regularly explained that in the context of broadcast ownership restrictions, the public interest embraces competition, localism, and "diversity of program and service *viewpoints*." *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (emphasis added; citation omitted); *accord In re 2018 Quadrennial Regulatory Review*, 33 FCC Rcd. 12111, 12127 (2018) ("our traditional policy goals [are] competition, localism, [and] viewpoint diversity"). And less than two years prior to the 1996 Act, this Court stated that access to "diverse and antagonistic" viewpoints had "long been a basic tenet of national communications policy," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 663 (1994) (collecting cases), without mentioning minority or female ownership diversity. *See also In re Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, 3547 (1995) (identifying "viewpoint, outlet and source diversity" as the "three types of diversity" that the FCC's television ownership rules "attempted to foster").

Furthermore, the Commission had made clear that its structural "ownership rules were *not* primarily intended to function as a vehicle for promoting minority ownership in broadcasting." *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 94 (1985) (emphasis added). Indeed, the Commission determined that "it would be *inappropriate* to retain multiple ownership regulations for the sole purpose of promoting minority ownership." *Id.* (emphasis added).

Because Congress "took the term" as the "law found it," *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 487 (2005), it incorporated competition, localism, and viewpoint diversity as potentially relevant public-interest considerations that could justify ownership restrictions. And among those, Congress plainly selected *competition* as the key consideration for the Commission's Section 202(h) reviews. There is no basis in the historical context of Section 202(h) for supposing that Congress, without saying so, required the Commission to consider minority and female ownership diversity.

Statutory context also confirms that the phrase "the public interest," as employed in Section 202(h), does not require the Commission to consider minority and female ownership. As explained above, the Communications Act contains other provisions, unlike Section 202(h), in which Congress expressly required the FCC to address that particular type of diversity. Because courts may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept," William N. Eskridge Jr., *Interpreting Law* 415 (2016), it would be improper to read such an obligation into "the public interest" in Section 202(h).

In addition to enforcing the non-delegation doctrine's limits on unbounded agency authority by interpreting "the public interest" in light of context, courts must also avoid conflict with other provisions of the Constitution, including the Fifth Amendment's limits on race- and gender-based decisionmaking. *See*, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S.

200, 235 (1995); *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); *see also Lamprecht* v. *FCC*, 958 F.2d 382, 399 (D.C. Cir. 1992) (Thomas, J.) (concluding that the FCC's "sex-preference policy" in the radio licensing context "violate[d] the Fifth Amendment"). Interpreting the "public interest" as mandating the consideration of minority and female ownership, or the retention of ownership restrictions for the sole purpose of promoting minority and female ownership, would raise serious constitutional concerns.[11]

4. The most natural reading of "the public interest" in light of the surrounding terms in Section 202(h) is that the FCC must examine whether the public-interest grounds upon which it initially based a particular media ownership rule continue to support the rule given current competitive conditions. Under the statute, the FCC must review the ownership rules "*adopted* pursuant to this section and all of its ownership rules" and must repeal or modify any rule that is "*no longer* in the public interest." 1996 Act, § 202(h) (emphasis added). By referring back to the time the rules were "adopted" and instructing the FCC to change rules that are "no longer" necessary, the statute contemplates a retrospective analysis. Thus, the FCC should look to the original rationale for each rule and test that rationale's continued validity against the modern competitive landscape. *See*

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[11] Indeed, in the 2002 review, the Commission questioned whether it had "legal authority to adopt measures to foster th[e] goal" of promoting minority and female ownership. *In re 2002 Biennial Regulatory Review—Review of Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of Telecommunications Act of 1996*, 17 FCC Rcd. 18503, 18521 & n.123 (2002) (citing, among other cases, *Adarand*).

Gustafson v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (because "a word is known by the company it keeps," courts must "avoid ascribing to one word [or phrase] a meaning so broad that it is inconsistent with its accompanying words"); *Nat'l Broad. Co.*, 319 U.S. at 216 ("the public interest" must be "interpreted by its context").

Here, as the FCC explained, the ownership rules were "*not*" adopted to "promote or protect minority and female ownership." Pet.App.117a (emphasis added); *see also*, *e.g.*, Pet.App.122a, 139a-40a, 161a-62a; JA171-72, 293, 309-10. So that factor is not a statutorily relevant "public interest" consideration in the review process under Section 202(h), and the FCC could not have been required to consider that factor when it changed the rules.

To be sure, the FCC has sometimes described "the public interest" more broadly in the Section 202(h) review process. For example, in 2003, the FCC said that "[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627 (2003). *But see In re Promoting Broadcast Internet Innovation Through ATSC 3.0*, 2020 WL 3091142, at *6 (FCC June 9, 2020) ("The Commission's media ownership limits are intended to promote viewpoint diversity, localism, and competition in broadcast services."). While the FCC may be free to *elect* to pursue those policy goals in the area of media ownership—as it has done in adopting measures to promote ownership diversity, such as in the *Diversity Order* and *Incubator Order*—nothing in Section 202(h) *requires* it to do so in reviewing its ownership rules.

B. The *Reconsideration Order* Fully Complied With Section 202(h).

The Third Circuit contravened Section 202(h) by imposing a mandatory duty on the FCC to consider minority and female ownership in reviewing its ownership rules, based solely on the court's own prior instruction that the Commission's reviews "must 'include a determination about the effect of the rules on minority and female ownership.'" Pet.App.34a (quoting *Prometheus III*, 824 F.3d at 54 n.13).

The Third Circuit never identified any statutory basis for its ruling that the FCC must consider ownership diversity in conducting its Section 202(h) reviews; as explained above, there is none. The panel has cited Section 309(i) and (j) only in the separate context of the eligible-entity definition, but those provisions relate to the initial award of spectrum licenses via auction and lottery and have nothing to do with Section 202(h) or the structural ownership rules. *See supra* 28-29. Nor has the panel ever pointed to any regulation that imposes such a duty.

Rather, the panel insisted here that the FCC was required to consider ownership diversity based on a footnote in the Third Circuit's own opinion in *Prometheus III*. *See* Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13). That footnote, in turn, quoted language from *Prometheus II* directing the FCC to determine "the effect of [the] rules on minority and female ownership." 824 F.3d at 54 n.13 (brackets in original) (quoting *Prometheus II*, 652 F.3d 431, 471 (3d Cir. 2011)). And the Third Circuit recognized that this judge-made instruction was an "*addition* to § 202(h)'s requirement." *Id.* (emphasis added).

That is because *Prometheus II*'s direction did not pertain to a Section 202(h) review. It concerned the "eligible entity definition" the FCC had previously adopted in the *Diversity Order* to promote ownership diversity *separate and apart* from its structural ownership rules. *See* 652 F.3d at 470-72 (citing *Prometheus I*, 373 F.3d at 420-21). And *Prometheus I*, relied upon in *Prometheus II* for the supposed duty to consider ownership diversity, held only that the FCC's repeal of a specific "regulatory provision that promoted minority television station ownership"—the Failed Station Solicitation Rule, *see supra* 10-11—required "discussion of the effect of its decision on minority television station ownership." 373 F.3d at 421 & n.58. It did not hold that the FCC had to take minority and female ownership into account in any, let alone all, of its Section 202(h) decisions.

Nothing in those prior decisions justifies the Third Circuit's purported requirement that the Commission consider minority and female ownership in its Section 202(h) reviews. *See*, *e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("a policy concern cannot justify supplanting the text's plain meaning"). The Third Circuit thus erred when it inquired whether the *Reconsideration Order* adequately addressed the panel's judge-made policy concerns, instead of asking whether the *Order* satisfied the requirements imposed in Section 202(h).

The answer to *that* question is clearly "yes." Congress instructed the FCC to consider "the result of competition," and that is exactly what the FCC did. The agency "built a substantial record" regarding competition in the media marketplace and the role of broadcast stations in local communities. JA103. Based on that record, the FCC determined that "dramatic changes in the marketplace" had rendered several ownership rules unnecessary or ineffective at promoting the public-interest values of competition, localism, and viewpoint diversity upon which the rules were originally based. Pet.App.67a-69a (alteration omitted); *see also* Pet.App.76a-122a (Newspaper/Broadcast Cross-Ownership Rule), 122a-40a (Radio/Television Cross-Ownership Rule), 140a-64a (Local Television Ownership Rule), 164a-78a (Local Radio Ownership Rule), 178a-99a (TV Joint Sales Agreement Attribution Rule). And the FCC expressly concluded—consistent with the plain text of Section 202(h), if not the Third Circuit's conception of the public good—that it could not "justify retaining" its ownership rules "under Section 202(h) based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." Pet.App.140a.

The FCC's analysis tracked the plain, competition-centric language of Section 202(h). "No party identifie[d] any reason to question the FCC's key competitive findings and judgments" or challenged its "core determination that the ownership rules have ceased to serve the 'public interest.'" Pet.App.55a (Scirica, J., dissenting). Because competitive findings and judgments are the only ones Congress specifically instructed the Commission to make, the FCC's competition analysis *required* it to modify or repeal the rules it did in the *Reconsideration Order*. *See* 1996 Act, § 202(h) ("The Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest." (emphasis added)); *Me. Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1320 (2020) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall.'"). It would have been unlawful for the FCC to seek to maintain rules based on "reasoning divorced from the statutory text." *Massachusetts* v. *EPA*, 549

U.S. 497, 532-35 (2007). Thus, contrary to the Third Circuit's holding, the Commission was not required to withhold necessary regulatory reform and preserve outdated regulations until it further considered minority and female ownership.

In short, the FCC did everything Congress told it to do in Section 202(h), and its competition-based findings stand unchallenged in this case. Accordingly, the Third Circuit erred in setting aside the FCC's decision to reform rules that it found no longer necessary as a result of competition.

II. NO PRINCIPLE OF ADMINISTRATIVE LAW SUPPORTS THE THIRD CIRCUIT'S JUDGMENT.

Despite the lack of any statutory requirement to consider minority and female ownership in Section 202(h) reviews, the Third Circuit declared that "ownership diversity" was an "'important aspect of the problem'" in such reviews as a matter of administrative law. Pet.App.41a (quoting *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see* Pet.App.34a ("In *Prometheus III* we stated that ... [the FCC] must 'include a determination about the effect of the rules on minority and female ownership.'"). The panel majority went on to hold that the Commission was obliged to treat ownership diversity as a potentially dispositive factor, and to produce robust statistical evidence about or in-depth theoretical analysis of the prospective effect of its rule changes on minority and female ownership before it could repeal or modify any rules. Pet.App.34a, 41a.

That holding is not only contrary to the statute, but also unsupported by any principle of administrative law. FCC practice does not support it, because the Commission has never treated minority and female ownership as a mandatory public-interest factor in reviewing its ownership restrictions—much less a dispositive one. That the Commission has historically sought to promote ownership diversity in some contexts does not make that policy goal an important aspect of every administrative problem the agency faces or prevent the Commission from taking any action without robust statistical (or theoretical) analysis of the prospective effect that its action would have on that goal. But even if the APA required the Commission to consider minority and female ownership in its Section 202(h) reviews, and it does not, the Commission's analysis of the evidence amply satisfied *State Farm*'s requirements for reasoned decisionmaking.

A. The FCC's Recognition Of Minority And Female Ownership As A Policy Goal In Some Contexts Does Not Convert It Into A Mandatory Factor In Section 202(h) Reviews.

The Third Circuit's declaration that minority and female ownership is an "'important aspect of the problem'" that the FCC must not "'entirely fail[] to consider'" in Section 202(h) reviews cannot be justified as following from the Commission's stated policy goals. Pet.App.37a, 41a (quoting *State Farm*, 463 U.S. at 43). The FCC has *never* determined that minority and female ownership can be a dispositive factor justifying the retention of a rule that is otherwise no longer in the public interest as the result of competition. The Commission has on occasion cited minority and female ownership as one component of diversity, and diversity as one component of the public interest. *See supra* 30, 33. But it has never treated that aspect of its policy goals as a mandatory factor in

Section 202(h) reviews, much less as a dispositive factor.

In its 2002 review, for example, the Commission noted that "[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity," and it stated that "[e]ncouraging minority and female ownership historically has been an important Commission objective." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13627, 13634 & n.68.[12] But it addressed minority and female ownership in the 2002 review by issuing a separate notice of proposed rulemaking to consider various

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[12] Notably, neither of the historical sources the FCC cited in support of that proposition mentioned female ownership. With respect to minority ownership, both found that increased minority ownership served the public interest in *viewpoint* diversity—and even then, the FCC did not suggest that promoting minority ownership could justify structural ownership restrictions. *See* S*tatement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 981 (1978) ("the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming"); *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 80-82 (1985) (agreeing with comments arguing "the Commission should take cognizance of the special contributions minorities make to viewpoint diversity"). The foundation for those findings has been called into question by subsequent decisions of this Court "rejecting the 'demeaning notion that members of defined racial groups ascribe to certain "minority views" that must be different from those of other citizens.'" *Schuette* v. *Coal. to Defend Affirmative Action*, 572 U.S. 291, 308 (2014) (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)) (ellipses omitted). Moreover, as the Third Circuit acknowledged, the FCC found here that "the evidence did not show a meaningful connection between female or minority ownership and viewpoint diversity." Pet.App.14a.

proposals for promoting ownership diversity. *See id.* at 13635-37. In reviewing whether its ownership rules were necessary in the public interest as the result of competition, however, the Commission did not even *mention* minority and female ownership. *See*, *e.g.*, *id.* at 13760-67 (analyzing whether the Newspaper/Broadcast Cross-Ownership Rule would promote viewpoint diversity).

The Commission continued with that approach until it conformed on remand with the Third Circuit's order to "include a determination about 'the effect of [the] rules on minority and female ownership.'" *Prometheus III*, 824 F.3d at 54 n.13 (alteration in original) (quoting *Prometheus II*, 652 F.3d at 471). Before *Prometheus II*, the Commission sought to promote minority and female ownership directly through separate initiatives like the *Diversity Order*, not indirectly through its structural ownership rules. The Commission generally did not even attempt to assess whether its ownership restrictions were necessary to promote minority and female ownership, much less propose to retain an ownership restriction solely because it might serve that goal. *See Prometheus II*, 652 F.3d at 472 (criticizing the Commission for "side-stepping" minority and female ownership in the 2006 review).

And even after the Third Circuit ordered the FCC to consider minority and female ownership, the Commission *still* did not purport to treat that goal as a dispositive factor. In the *Second R&O*, for example, the Commission concluded that retaining its rules was "*consistent* with [its] goal of promoting minority and female ownership." JA221 (emphasis added). But the Commission made crystal clear that it was "not" retaining those rules "with the *purpose* of preserving or creating specific amounts of minority and female ownership." JA293 (emphasis added).

Finally, in the *Reconsideration Order*, the FCC expressly declined to treat minority and female ownership as dispositive, explaining, for example, that it could not "continue to subject broadcast television licensees to aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership." Pet.App.162a. That was consistent with the FCC's longstanding position that "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership." *In re Amend. of Sec. 73.3555*, 100 FCC 2d at 94.

The mere fact that the FCC has a policy goal of promoting minority and female ownership in some contexts does not make ownership diversity an "'important aspect of the problem'" that the Commission must consider in evaluating its ownership rules under Section 202(h). *See* Pet.App.41a (quoting *State Farm*, 463 U.S. at 43). An agency is not required to consider—let alone adopt rules promoting—all of its policy goals in every proceeding. "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." *Massachusetts*, 549 U.S. at 524. For that reason, at least before the Third Circuit transformed policy preferences about minority and female ownership into a be-all and end-all legal requirement, the FCC had addressed measures to promote such ownership diversity in, for example, adopting the *Diversity Order*, but not when reviewing structural ownership restrictions. Nothing in the APA required the Commission to alter that approach.

Thus, the Third Circuit's judgment cannot be justified based on the FCC's recognition of minority and female ownership as an important policy goal. The judgment is grounded only in the panel majority's policy goals.

B. In Any Event, The FCC Adequately Considered Minority And Female Ownership.

Even if the APA required the Commission to consider minority and female ownership based on some past invocation of that policy, and it does not, the FCC adequately did so in the *Reconsideration Order*. It reviewed the evidence in the record, "reasonably predicted" based on the record that "the regulatory changes dictated by the broadcast markets' competitive dynamics [would] be unlikely to harm ownership diversity," and explained how it reached that conclusion. Pet.App.47a (Scirica, J., dissenting); *see also* Pet.App.57a-58a (canvassing record evidence). "No commenter introduced evidence that contradicted the FCC's prediction that changing the rules would unlikely affect ownership diversity." Pet.App.52a-53a. In reviewing the record evidence, the Commission easily satisfied *State Farm*'s requirements for reasoned decisionmaking.

Take the FCC's analysis of the Newspaper/Broadcast Cross-Ownership Rule. The FCC decided to repeal the Rule because it "is not necessary to promote the Commission's policy goals of viewpoint diversity, localism, and competition, and therefore does not serve the public interest." Pet.App.86a. This action, the FCC explained, reflected "the Commission's longstanding determination that the [R]ule does not advance localism and competition." Pet.App.87a. And in light of dramatically changed competitive conditions, the Commission found that the Rule "is no longer necessary to promote viewpoint diversity." *Id.*

With respect to minority and female ownership, the Commission specifically concluded that eliminating the Rule would *not* materially harm ownership diversity and might actually increase minority ownership of newspapers and broadcast stations. Pet.App.119a-21a. That conclusion was based on comments received from organizations representing minority media organizations, which argued that eliminating the Rule could "boost the ability of . . . small broadcaster[s] to compete." Pet.App.118a-19a. The Commission also explained that eliminating the Rule was unlikely to have a significant effect on minority and female broadcast ownership, because radio stations are relatively easy to acquire and owners of television stations are more likely to acquire newspapers than vice versa. Pet.App.119a-20a. And the Commission found "no evidence to suggest that eliminating" the Rule would result "in an overall decline in minority and female ownership of broadcast stations." Pet.App.120a. "Thus, fostering minority and female ownership d[id] not provide a basis to retain the [R]ule." Pet.App.122a. The Commission made similar findings with respect to the remainder of the rules that it eliminated or modified. *See* Pet.App.138a-40a (Radio/Television Cross-Ownership Rule), 161a-62a (Local Television Ownership Rule); *see also* Pet.App.194a (in eliminating the TV Joint Sales Agreement Attribution Rule, noting that "certain [TV joint sales agreements] have helped spur minority ownership").

Given the Commission's unchallenged findings that the rules it repealed or modified were no longer necessary in light of competition—and the complete absence of any record evidence showing that changing the rules would have any adverse effect on minority and female ownership—the Commission's conclusion that it should repeal or modify the rules was not only rational, but obvious.

Indeed, if the Commission had retained long-outdated ownership rules that are no longer necessary in the public interest as the result of competition "based on the unsubstantiated hope that" they would "promote minority and female ownership," Pet.App.140a, its action would have been arbitrary and capricious under the APA, as well as contrary to Section 202(h).[13] *Cf. In re Amend. of Sec. 73.3555*, 100 FCC 2d at 94 (concluding "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership"). As this Court has explained, an agency rule is arbitrary and capricious not only when the agency "entirely fail[s] to consider an important aspect of the problem," but also when the agency "relie[s] on factors which *Congress has not intended it to consider*." *State Farm*, 463 U.S. at 43 (emphasis added); *see*, *e.g.*, *Massachusetts*, 549 U.S. at 532-35 (directing vacatur of agency action for considering factors other than those permitted by statute); *Whitman*, 531 U.S. at 464-71 (same). And there is no plausible argument that Congress required

[13] In fact, a pending petition for review of the *Second R&O* raised exactly this issue. *See* Petition for Review, *News Media All.* v. *FCC*, No. 17-1108 (3d Cir. filed Jan. 18, 2017). The Third Circuit is holding that petition in abeyance pending this Court's decision in this case. Order, No. 17-1108 (3d Cir. Feb. 6, 2020).

the FCC to consider minority and female ownership in its Section 202(h) reviews. *See supra* I.

Thus, the Third Circuit far exceeded its proper role under the APA when it not only rejected the Commission's explanation as irrational but also ordered the FCC to come forward with "new empirical research or an in-depth theoretical analysis" on the effect of rule changes on minority and female ownership. Pet.App.41a. "The APA imposes no general obligation on agencies to produce empirical evidence." *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.). And "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

It was the duty of the commenters who wished to retain the Commission's rules to submit empirical research or in-depth theoretical analysis in support of that position. It was not the FCC's job—either as a matter of general administrative law, *see* 5 U.S.C. § 556(d), or under the deregulatory presumption imposed by Section 202(h)—to accomplish that task before the Commission could modify its rules. Otherwise, a commenter could effectively control the outcome of the Section 202(h) process simply by lobbing in an unsupported assertion as a reason to keep a rule and forcing the FCC to do the impossible of proving a negative. Agencies go to final rules with the record they have, i.e., the one made by commenters; they need not build a perfect record to justify repealing rules that *lack* record support, especially in the context of a statute designed to achieve regulatory reform. Concluding otherwise would be contrary to the entire deregulatory bent of Section 202(h).

For all these reasons, the Third Circuit erred in vacating the *Reconsideration Order*. This Court should reverse.

III. THE THIRD CIRCUIT'S REMEDY IS VASTLY OVERBROAD, AND THE PANEL IMPROPERLY RETAINED JURISDICTION OVER THE COMMISSION'S SECTION 202(h) REVIEWS.

The Third Circuit compounded the errors discussed above—which warrant reversal on the merits—by issuing a vastly overbroad remedy. The panel majority not only vacated the *Reconsideration Order*, but *also* the *Incubator Order* and the *Second R&O*'s "eligible entity" definition in their entirety. On top of that, the panel purported to retain continuing jurisdiction over these issues, thereby perpetuating its self-proclaimed status as the national media ownership review board.

1. To begin with, the Third Circuit's reasoning provides no basis for vacating the *Incubator Order* or the *Second R&O*'s "eligible entity" definition. The Third Circuit's conclusion that the Commission did not sufficiently consider the impact of the *Reconsideration Order*'s media ownership rule changes on minority and female ownership, even if it were accurate (it is not), has no bearing on the validity of the *Incubator Order*. That separate *Order* adopted independent rules designed to *increase* ownership diversity consistent with constitutional limitations by authorizing special waivers of the Local Radio Ownership Rule for broadcasters providing significant support for new entrants. *See* Pet.App.16a. The Third Circuit's reasoning is

likewise inapplicable to the *Second R&O*'s eligible-entity definition, which identifies the parties eligible for preferences related to tower construction, station licensing, and auction proceedings. *See* JA384-87. Although the Commission adopted that definition in the same overall proceeding that resulted in the *Reconsideration Order*, the media ownership rules do not incorporate or rely on the eligible-entity definition in any way.

A court may "set aside agency action" under the APA only if the action is "found to be" "unlawful." 5 U.S.C. § 706(2). Because the Third Circuit did not identify any legal defects in the *Incubator Order* or the eligible-entity definition (indeed it *rejected* challenges to the *Incubator Order*, *see* Pet.App.30a-34a), it lacked authority to vacate those rules and the judgment below should be reversed with respect to each of them.

For similar reasons, reversal is also warranted regarding the *Reconsideration Order*'s waiver provision for embedded radio markets and its repeal of the TV Joint Sales Agreement Attribution Rule. The embedded radio markets provision created a narrow presumption in favor of allowing certain station acquisitions in "parent" radio markets with multiple embedded sub-markets. Pet.App.175a-78a. The judgment below vacated the embedded radio markets policy along with the rest of the *Reconsideration Order*, even though Respondents did not *mention* it in the underlying rulemaking proceedings or appellate briefing, let alone demonstrate that the policy was unlawful. *Cf. United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Similarly, Respondents failed to mention the TV Joint Sales Agreement Attribution Rule in their opening briefs in the Third Circuit, and on reply advanced only the incorrect argument that the FCC's decision to eliminate that rule had been based on the same data as the remainder of the rules. *See* Pet.App.184a-99a (determining that TV joint sales agreements do not provide stations selling advertising time on other stations with sufficient indicia of control to warrant attribution and that non-attribution is otherwise in the public interest). And although Industry Petitioners pointed out that Respondents had offered no argument for vacating the Rule, the Third Circuit ignored the point. Courts have no license to "substitute [their] judgment for that of the agency," *State Farm*, 463 U.S. at 43; all the more where, as here, no party substantively challenged the agency action in the first place.[14]

2. The judgment below is also improper because even if the Third Circuit were correct on the merits, it should have remanded the challenged rules without vacating them, thus providing the Commission an opportunity to provide the purportedly necessary data and analysis. Remand without vacatur is warranted where: (i) the agency "can redress its failure of explanation on remand while reaching the same result," *Black Oak Energy, LLC* v. *FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); and (ii) vacatur would result in significant "disruptive consequences," *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see also* 33 Charles Alan Wright et al., *Federal Practice and Procedure*

[14] The FCC's decisions regarding the embedded radio markets provision and the TV Joint Sales Agreement Attribution Rule are severable because there is no indication that they could not function independently of the *Reconsideration Order*'s other provisions. *See K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 294 (1988).

§ 8382 (2d ed. supp. 2020) (remand without vacatur is the "'general practice' for remedying an agency's failure to provide adequate reasons for an action" (citation omitted)).

Both of those conditions are satisfied here. *First*, the Third Circuit itself acknowledged that the Commission could adopt the same substantive reforms after undertaking "a meaningful evaluation" of their effect on ownership diversity. Pet.App.41a. *Second*, for the reasons given above, *see supra* 8-9, "the burdens of vacatur on both the regulated parties . . . and the Commission counsel in favor of providing the Commission with an opportunity to rectify [any] errors." *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019) (per curiam). Section 202(h) calls for periodic updating of media ownership regulations in light of changes in the marketplace, and no party to the proceedings below "identifie[d] any reason to question the FCC's key competitive findings and judgments," Pet.App.55a (Scirica, J., dissenting), making remand without vacatur particularly appropriate here.

3. Finally, the Third Circuit has repeatedly overstepped its authority in yet another way: by retaining exclusive jurisdiction over the Commission's Section 202(h) reviews. *See*, *e.g.*, Pet.App.45a. Some judicial review statutes—including a provision that governs "[a]ppeals" from other types of Commission proceedings—vest jurisdiction in a single court of appeals. *See*, *e.g.*, 47 U.S.C. § 402(b); 42 U.S.C. § 7607(b)(1); 28 U.S.C. § 1295. In contrast, the statutory scheme applicable here—the Hobbs Administrative Orders Review Act—grants *all* of the federal courts of appeals (save the Federal Circuit) subject matter jurisdiction over challenges to

Commission regulations, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), and gives challengers a choice between two venues—the "judicial circuit in which the petitioner resides or has its principal office, or" the D.C. Circuit, 28 U.S.C. § 2343. That approach reflects a conscious choice by Congress *not* to restrict cases like this one to a single tribunal. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original; citation omitted)).

Despite that clear congressional command, the same panel of the Third Circuit has retained jurisdiction over challenges to every one of the Commission's Section 202(h) reviews since 2002. *See Prometheus III*, 824 F.3d at 60; *Prometheus II*, 652 F.3d at 472; *Prometheus I*, 373 F.3d at 435. The Judicial Panel on Multidistrict Litigation selected the D.C. Circuit in 2014 as the venue for the petitions that ultimately resulted in *Prometheus III*. *See* 824 F.3d at 38-39. But that court transferred the fully briefed petitions to the Third Circuit over the objections of several parties (including two of the Petitioners here) based on the Third Circuit's retention of jurisdiction. *See id.* at 39. A similar dynamic played out here: several cases filed in the D.C. Circuit were transferred to the Third Circuit, which once "again retain[ed] jurisdiction over" the Commission's action. Pet.App.17a, 45a.

The Third Circuit's perpetual retention of jurisdiction is inconsistent with the Hobbs Act and will continue to distort the Commission's regulatory reform reviews unless corrected by this Court. As Judge Williams explained in connection with the *Prometheus III* transfer order, "given the widening circle of interlocked issues, plus the Commission's interminable processes . . . , a vast range of issues may be forever committed to one circuit, contrary to the goals of Congress in authorizing review in 12 different circuits." Order at 3, *Howard Stirk Holdings, LLC* v. *FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015) (statement of Williams, J.). Section 202(h) reinforces this conclusion by mandating a new, *separate* review proceeding every four years.

To clear the way for the FCC to implement Section 202(h) as Congress intended, this Court should direct that future challenges to the Commission's proceedings under the statute may be filed in any court authorized by law.

CONCLUSION

This Court should reverse the decision below and instruct the Third Circuit to deny Respondents' petitions for review.

Respectfully submitted.

EVE KLINDERA REED
JEREMY J. BROGGI
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20036
(202) 719-7000

Counsel for Petitioner Nexstar Inc. f/k/a Nexstar Broadcasting, Inc.

HELGI C. WALKER
Counsel of Record
JACOB T. SPENCER
MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
hwalker@gibsondunn.com

Counsel for Petitioner National Association of Broadcasters

November 16, 2020

KENNETH E. SATTEN
CRAIG E. GILMORE
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141

Counsel for Petitioners Bonneville International and The Scranton Times L.P.

DAVID D. OXENFORD
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141

Counsel for Petitioner Connoisseur Media LLC

KEVIN F. KING
ANDREW SOUKUP
RAFAEL REYNERI
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Petitioners Fox Corporation and News Media Alliance

SALLY A. BUCKMAN
PAUL A. CICELSKI
LERMAN SENTER PLLC
2001 L Street, NW
Suite 400
Washington, DC 20036
(202) 429-8970

Counsel for Petitioner News Corporation

MILES S. MASON
JEETANDER T. DULANI
JESSICA T. NYMAN
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 17th Street, NW
Washington, DC 20036
(202) 663-8000

Counsel for Petitioner Sinclair Broadcast Group, Inc.

Attachment B

Nos. 19-1231 & 19-1241

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,
v.
PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
Petitioners,
v.
PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR INDUSTRY PETITIONERS

EVE KLINDERA REED
JEREMY J. BROGGI
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20036
(202) 719-7000

Counsel for Petitioner Nexstar Inc. f/k/a Nexstar Broadcasting, Inc.

HELGI C. WALKER
Counsel of Record
JACOB T. SPENCER
MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
hwalker@gibsondunn.com

Counsel for Petitioner National Association of Broadcasters

[Additional counsel listed on signature page]

RULE 29.6 STATEMENT

The Rule 29.6 disclosure statement in the brief for Industry Petitioners remains accurate.

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REPLY BRIEF FOR INDUSTRY PETITIONERS

INTRODUCTION

In the *Reconsideration Order*, the Commission did exactly what Congress told it to do in Section 202(h). The Commission evaluated the current media marketplace, concluded that some of its decades-old ownership limits no longer made sense in light of vast competitive changes, and repealed or modified those rules. Respondents never challenged that conclusion. Yet the Third Circuit once again blocked the Commission's regulatory reforms based solely on its conclusion that the agency failed adequately to consider the effect of its rule changes on minority and female ownership. Consequently, the broadcast and newspaper industries continue to struggle under the dead weight of those rules.

Respondents fail to show that the Third Circuit's judgment was consistent with Section 202(h). Congress directed the Commission to consider whether its rules were "necessary in the public interest *as the result of competition*," 1996 Act, § 202(h) (emphasis added), not to consider minority and female ownership or the public interest in a vacuum. Competition must drive the Commission's entire analysis; it is no mere "*input*" to be trumped by atextual policy concerns. Resp.Br.27. Respondents' interpretation permitting the Commission to retain, repeal, or even tighten ownership restrictions based on any factor under the sun would gut Section 202(h) and wrench it out of its pro-competitive, deregulatory context. And Respondents' contention that the Commission can retain ownership limits for the sole purpose of promoting minority and female ownership finds no support in the statute's text—and raises constitutional concerns that are hardly "unfounded." Resp.Br.26 n.7.

Respondents' attempt to characterize the *Order* as inconsistent with the Commission's obligations under *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), is a red herring. The Commission has never bound itself to consider minority and female ownership in Section 202(h) reviews, let alone treat that as a dispositive threshold requirement. The Third Circuit imposed that obligation on its own say-so, citing only its opinions as the source of that purported duty before landing on *State Farm*. As Respondents' sources show, the Commission historically has not addressed minority and female ownership through structural ownership limits but targeted measures in separate proceedings.

In any event, Respondents' microscopic critique of the *Order*'s statistical analysis does not show that the Commission failed adequately to consider minority and female ownership. The Commission relied primarily on the absence of any record evidence that the ownership limits increase minority and female ownership. And it openly acknowledged the problems with the available data, which played a minor role in the analysis. The Commission's determination that it could not retain long-outdated rules under Section 202(h) based on the unsubstantiated hope they might promote minority and female ownership was correct. The Third Circuit's 15-year blockade of reasonable reforms, based on its atextual policy preferences, must now come to an end.

ARGUMENT

I. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S ELEVATION OF POLICY CONCERNS OVER THE COMPETITION ANALYSIS CONGRESS SPECIFICALLY REQUIRED.

Section 202(h) instructs the FCC, as part of "its regulatory reform review," to regularly update ownership rules that are no longer "necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). Respondents do not dispute that the FCC properly analyzed the effects of competition here, nor did the Third Circuit. Instead, Respondents contend that "the public interest" requires the agency to promote minority and female ownership and that this requirement trumps the competition analysis Congress expressly mandated. Central to this theory is the claim that competition is not the "primary" consideration under Section 202(h). Resp.Br.27. But text, context, and purpose prove otherwise: Congress commanded a new deregulatory approach that turns on competition.

Respondents attack a straw man by asserting that Section 202(h) does not "require a competition-*only* standard." Resp.Br.30 (emphasis added). Rather, Industry Petitioners contend that the Third Circuit erred by engrafting a requirement to consider minority and female ownership onto the statute. Section 202(h) does not expressly require the Commission to consider that factor. Nor is it implicitly required by the "public interest," which in the context of the ownership rules has historically included competition, localism, and viewpoint diversity—not race and gender ownership diversity. Even assuming that minority and female ownership is a *permissible* factor in Section 202(h) reviews, that atextual policy goal, standing alone, cannot justify retaining rules that are otherwise no longer necessary in light of competition.

A. Section 202(h) Requires The FCC To Consider Competition, Not Minority And Female Ownership.

Section 202(h) does not expressly direct the FCC to consider minority and female ownership, and "the public interest" cannot be understood as implicitly requiring the Commission to do so. Industry.Br.25-33. Whatever the outer bounds of the public-interest standard in this context, Congress plainly intended competition to play a starring role, not second fiddle, in regulatory reform reviews.

1. Respondents distort Section 202(h) by characterizing "[c]ompetition" as a mere "*input* in the required analysis." Resp.Br.27. But competition is not just any policy goal under this statute. It is the *only* factor Congress specifically identified, and that singular status indicates its preeminence as the driver of the entire statutory analysis. Although Respondents stress the "public interest," that language is not free-standing: The Commission must determine whether the ownership rules "are necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). Competition is the lens through which the public-interest need for the rules must be viewed—not the other way around.[1]

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[1] Respondents and their *amici* point to the two-sentence structure of Section 202(h), suggesting the second sentence empowers the Commission to consider the public interest unbounded by competition. Resp.Br.26; Congressional.Br.11-13. The two sentences work together and should be read accordingly. Congress had no need to repeat "as the result of competition" in

In their effort to downplay Congress' objective of ensuring the FCC actually updates its rules, Respondents misquote the statute. Claiming "the text [of] § 202(h) mandates 'regulatory *review*,'" Respondents assert the statute asks the FCC only to "review, not repeal" regulations. Resp.Br.27. The statute does not require review for review's sake. It demands "regulatory *reform* review," and directs that the FCC "*shall* repeal or modify" any regulation rendered unnecessary by competition. 1996 Act, § 202(h) (emphases added). Section 202's other provisions, which eliminated or relaxed various ownership rules, provide strong contextual evidence of Section 202(h)'s deregulatory bent. *See Fox TV Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (Congress enacted Section 202(h) "to continue the process of deregulation"). The purpose of the 1996 Act—to "promote competition" and "reduce regulation"—drives that conclusion home. 1996 Act, Preamble. The point of Section 202(h) is not just *review* but *reform*, with the focus squarely on competition.

Respondents' interpretation also "encounter[s] a superfluity problem." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1058 (2019). If Section 202(h) imposes the same standard as "any other" grant of rulemaking authority, Resp.Br.24, and "the public interest as the result of competition" just means "the public interest," *see* Resp.Br.27, Section 202(h) is nearly meaningless. The Communications Act already instructs "the Commission from time to time" to "[m]ake such rules and regulations" as will serve

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the second sentence, because the "determin[ation]" identified there is the determination required by the first sentence, which is cabined by "the result of competition." 1996 Act, § 202(h).

"the public interest." 47 U.S.C. §§ 303(r), 309(a). And the Commission already is legally bound to reevaluate its rules as "time and changing circumstances" demand. *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943); *see ACLU* v. *FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987) (APA requires the Commission "carefully [to] monitor the effects of its regulations and [to] make adjustments where circumstances so require").

Under Respondents' view, then, Section 202(h) would do nothing more than impose a timing requirement on the Commission to take a general look at the ownership rules every four years, with no different orientation than in a typical rulemaking. But Congress knew how to instruct the Commission to review ownership rules without pursuing a deregulatory purpose or giving primacy to a specific factor. That is what Congress did in Section 202(c), ordering the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its Local Television Rule. 1996 Act, § 202(c)(2). Congress' choice of differing language in Section 202(h) compels the conclusion that Section 202(h) reviews must center on competition—and achieve meaningful reform.

2. Because Section 202(h) expressly identifies "competition" without mentioning minority and female ownership, Respondents cast about for other statutory hooks. What they come up with is irrelevant or merely confirms that Congress knows how to direct the Commission to consider their preferred policy goal when it wants to.[2]

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[2] Respondents' theory is not entirely clear. They sometimes appear to argue that Section 202(h) requires the Commission to consider minority and female ownership. Resp.Br.23, 29-30.

Respondents rely on 47 U.S.C. § 257. Resp.Br.8, 28. That provision does not mention race or gender and is not even about broadcasting. It required the FCC to adopt regulations eliminating market entry barriers "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). And Congress' directive to "promote ... diversity of media voices, vigorous economic competition, technological advancement, *and* promotion of the public interest" in that context, *id.* § 257(b) (emphasis added), underscores its decision in Section 202(h) to specifically identify only competition, not other factors, and to tie the "public interest" to competition, not leave it free-standing.

Section 1 of the Communications Act does not help Respondents either. Resp.Br.8, 28. There, Congress explained it established the FCC to make communications services available "to all the people of the United States, without discrimination on the basis of race ... or sex." 47 U.S.C. § 151. But a nondiscrimination policy for the availability of services is not an affirmative mandate to favor certain groups as station owners. *See*, *e.g.*, *Schuette* v. *Coal. to Defend Affirmative Action*, 572 U.S. 291, 313-14 (2014) (plurality opinion) (Equal Protection Clause does not require racial preferences). Section 1 provides no support for the conclusion that Section 202(h) requires the Commission to promote minority and female ownership.

The same goes for Section 309(i) and 309(j). Congress instructed the FCC to consider minority and

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Other times, they suggest that Section 202(h) merely "*authorizes*" the Commission to do so. Resp.Br.26, 32-33.

female preferences in lotteries and auctions to assign initial spectrum licenses. 47 U.S.C. § 309(i), (j). Congress terminated the Commission's lottery authority in 1997, *id.* § 309(i)(5), and expressly limited the preference in Section 309(j) to auctions, *id.* § 309(j)(6). Those provisions have nothing to do with Section 202(h), and demonstrate that Congress knows how to direct the Commission to pursue minority and female diversity but did not do so here.

3. Lacking textual footing, Respondents argue that Congress "cement[ed]" the view that "the public interest" necessarily includes minority and female ownership when it amended Section 202(h) and left the operative language unchanged. Resp.Br.29-30 (citing Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 and *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627 (2003)). While this Court has "recognized congressional acquiescence to administrative interpretations of a statute in some situations," it has done so "with extreme care." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). Respondents fail to identify "overwhelming evidence of acquiescence," *id.* at 169 n.5, to any "settled" construction endorsing their view, *Jama* v. *ICE*, 543 U.S. 335, 351 (2005).

The 2004 appropriations rider was narrowly targeted: It decreased the frequency of Section 202(h) reviews from "biennially" to "quadrennially," § 629(3), and raised the national television ownership cap (not at issue here) from 35% to 39%, § 629(1)-(2). It did not "comprehensively revise[ ] [the] statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). Thus, even if the FCC had previously adopted Respondents' understanding of Section 202(h), the

2004 rider's "isolated amendments" could not have ratified that interpretation. *Id.*

In fact, the FCC had *not* adopted Respondents' understanding. As the sole basis for their ratification theory, Respondents rely on a statement from the 2002 review describing "minority and female ownership diversity" as one of "five types of diversity pertinent to media ownership policy." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13627. One sentence in one Section 202(h) review does not establish a "consensus so broad and unquestioned" that this Court "must presume Congress knew of and endorsed it." *Jama*, 543 U.S. at 349. Moreover, the FCC never referred to minority and female ownership when it went on to actually review the ownership limits; instead, the agency discussed that policy goal separately and issued a notice of proposed rulemaking to consider other types of proposals to advance ownership diversity. Industry.Br.39-40.

These actions did not establish a settled administrative interpretation of "the public interest" requiring review of minority and female ownership under Section 202(h), let alone making that factor dispositive. If Congress ratified anything in 2004, it was the Commission's decision *not* to base its Section 202(h) reviews on minority and female ownership.

4. Respondents wave away the serious constitutional problems their interpretation of Section 202(h) raises by asserting those "concerns" are "not presented." Resp.Br.26 n.7. The canon of constitutional avoidance, however, is always relevant to statutory interpretation. *See Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) (courts interpreting statutes must consider constitutional problems "whether or not those constitutional problems pertain

to the particular litigant before the [c]ourt"); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("the court . . . retains the independent power to identify and apply the proper construction of governing law").

The canon applies with particular force here. In *National Broadcasting Co.*, this Court held that "the public interest" must "be interpreted by its context" to prevent "an unconstitutional delegation of legislative power." 319 U.S. at 209-10, 216. Respondents' reading of the "public interest" would unmoor it from the competition-centric text, context, and purpose of Section 202(h) and allow the FCC to retain, repeal, or even "tighten," Resp.Br.9, any media ownership rule based on any policy goal whatsoever, with no apparent limiting principle.

Respondents' interpretation would also create constitutional problems by enabling the Commission to retain structural ownership rules for the *sole* purpose of promoting minority and female ownership. In the *Reconsideration Order*, the Commission made the unchallenged conclusions that the rules at issue were no longer necessary to promote competition, localism, or viewpoint diversity. Accordingly, the only basis on which the Commission could have retained them—on Respondents' view—would be if it intended that they would result in more minorities and women owning broadcast stations. Interpreting Section 202(h) to permit that result would raise serious constitutional difficulties, even if the rules themselves are facially "race- and gender-neutral." Resp.Br.26 n.7; *see Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2496 (2019) ("Laws . . . that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid."); *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 213 (1995) (noting "the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose").

These constitutional concerns are hardly "unfounded." Resp.Br.26 n.7; Southeastern.Legal. Found.Amicus.Br.9-16.

5. In light of these concerns and Congress' clear intent to create a meaningful "regulatory reform review" process driven by competition in Section 202(h), the best reading of "the public interest" is that the FCC must examine whether the public-interest grounds upon which it initially based a particular ownership rule still support the rule under current competitive conditions. Industry.Br.32-33; *see* Resp.Br.24 (conceding that "Section 202(h) mandates a primarily retrospective analysis").[3] Thus, the FCC should test the rule's *original* public interest rationale against competition to assess its continued necessity, not invent new public interest rationales for keeping (or tightening) the rule despite competitive changes.

Even if the Commission could rely on new public interest rationales, Resp.Br.27, it still must focus primarily on competition in analyzing whether the ownership rules remain necessary. In Section 202(h), Congress specifically chose "competition" to guide the FCC's analysis, *see supra* 4-6, and this Court should honor that express limitation on the agency's "public interest" authority under Section 202(h).

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[3] Industry Petitioners do not endorse Respondents' view that the retrospective nature of the inquiry means the Commission cannot make "predictive judgment[s]" in assessing the effects of rule changes. Resp.Br.44.

At bottom, Respondents ask this Court to uphold the Third Circuit's decision freezing in place ownership limits enacted in another technological age and to adopt an interpretation of Section 202(h) that would gut the statute. That request is inconsistent with any plausible interpretation of Section 202(h).

B. The *Reconsideration Order* Fully Complied With Section 202(h).

The *Reconsideration Order* fully complied with Congress' instruction to "review" and "repeal" or "modify" ownership rules that it determines are no longer "necessary in the public interest as the result of competition." 1996 Act, § 202(h); Industry.Br.34-37.

Respondents never challenged the FCC's competition analysis, and they *still* do not dispute it. They now describe the analysis as a "close policy call" that "was maybe (at least arguably) reasonably explained." Resp.Br.50-51. Far from an assertion of error, that statement borders on a concession of lawfulness. Regardless, Respondents have long since forfeited any challenge to the Commission's competition findings. They offer no citation to support the claim they "consistently argued that the rules are still necessary in the public interest writ large." Resp.Br.50. *But see* Pet.App.55a (Scirica, J., dissenting) ("[Respondents] leave untouched the FCC's core determination that the ownership rules have ceased to serve the 'public interest'" and identify no "reason to question the FCC's key competitive findings and judgments"). And they do not deny that the Commission must repeal or modify rules that it determines are no longer necessary in the public interest. Resp.Br.8.

Thus, Respondents' lone argument for overturning the *Order* is that the Commission did not adequately consider the supposed "ownership-diversity factor." Resp.Br.50-51. But that judicially created factor cannot outweigh the unchallenged competitive judgments Congress explicitly directed the Commission to make. Industry.Br.35-37; *see also Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." (citation omitted)). Because the *Order* complied with all the requirements of the statute, the Third Circuit had no warrant to invalidate the rule changes.

C. *Chenery* Is No Bar To This Court's Reliance On Statutory Grounds.

Nothing in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), bars this Court from upholding the *Reconsideration Order* under the correct interpretation of Section 202(h). Resp.Br.26.

The question on the table is whether the *Third Circuit* correctly construed Section 202(h) in setting aside the *Order* based on the panel's policy preferences about minority and female ownership. The Constitution assigns "to the judiciary the duty of interpreting [laws] and applying them in cases properly brought before the courts." *Patchak* v. *Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion); *see also* 5 U.S.C. § 706 ("the reviewing court shall . . . interpret . . . statutory provisions"). Under *Chenery*, courts refrain from making policy judgments "exclusively entrusted to an administrative agency," 318 U.S. at 88; but they can and must make "determination[s] of law" about what the agency was—or was not—required to do in the first place, *id*. at 94.

Moreover, "[t]he *Chenery* doctrine has no application" where an agency lacks discretion, even if it "provided a different rationale for the necessary result." *Morgan Stanley Capital Grp.* v. *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544-45 (2008). That well-established exception applies here because the Commission's unchallenged competition findings precluded it from lawfully retaining the rules it repealed or modified solely to promote minority and female ownership. Industry.Br.36-37. Even if the FCC's analysis of that issue were found deficient, remand "would be an idle and useless formality," *Morgan Stanley*, 554 U.S. at 545, because the FCC lacks "discretion" to overcome the statutorily required competition determination based "on reasoning divorced from the statutory text," *Massachusetts* v. *EPA*, 549 U.S. 497, 532-33 (2007); *see also* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error").

In any event, *Chenery* is satisfied here. That case instructs that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87. The FCC *did* rely on statutory grounds in concluding it was obligated to repeal or modify ownership rules, separate and apart from *any* findings regarding the effect of those changes on minority and female ownership. For example, the Commission found that "[i]n light of the significantly expanded media marketplace" and its determination that the Newspaper/Broadcast Cross-Ownership Rule was "not necessary to promote viewpoint diversity, competition, or localism[,] . . . immediate repeal is *required* by Section 202(h)." Pet.App.115a (emphasis added). Similarly, the Commission concluded that the Radio/Television Cross-Ownership Rule "is no longer in the public interest under Section 202(h)" and must be jettisoned because it harmed localism "without providing meaningful offsetting benefits to viewpoint diversity." Pet.App.137a-138a & n.197; *see also* Pet.App.150a-151a (modified portion of the Local Television Rule "does not serve the public interest" and "must be eliminated"). The *Order* was based upon—and should be judged upon—those grounds.

That the Commission also complied with the Third Circuit's mandate to "include a determination about 'the effect of [the] rules on minority and female ownership,'" *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 54 n.13 (3d Cir. 2016) ("*Prometheus III*") (alteration in original), makes no difference. The Commission made clear that it was ultimately acting pursuant to Section 202(h), concluding it could not "justify retaining the [Radio/Television Cross-Ownership Rule] under Section 202(h) based on the unsubstantiated hope that the rule will promote minority and female ownership." Pet.App.140a; *see also* Pet.App.162a ("Under Section 202(h), however, we cannot" retain "aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership.").

This Court can and should reverse the Third Circuit on the ground that the *Order* fully complied with Section 202(h).

II. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S JUDGMENT BASED ON ADMINISTRATIVE LAW PRINCIPLES.

A. The FCC Has Never Bound Itself To Consider Minority And Female Ownership In Section 202(h) Reviews.

Respondents suggest it does not matter whether Section 202(h) requires the Commission to assess the effect of rule changes on minority and female ownership because the Commission's prior "commitment[s]" made that assessment "mandatory" under the APA's principle of reasoned decisionmaking. Resp.Br.32. Respondents' premise is wrong: The Commission has never treated minority and female ownership as a mandatory factor in Section 202(h) reviews, much less a dispositive one. Industry.Br.38-42. Thus, this issue was not "'an important aspect of the problem'" that the Commission "must consider" in Section 202(h) reviews, Pet.App.41a (quoting *State Farm*, 463 U.S. at 43); it was, at most, an ancillary one.[4]

Historically, the Commission has promoted minority and female ownership directly through targeted measures, not indirectly through structural ownership limitations. Industry.Br.33, 39-40. Consistent with that practice, *none* of the ownership rules at issue here was adopted to advance minority and female ownership. They were founded on the traditional public interest goals of competition, localism, and viewpoint diversity. Industry.Br.33.

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[4] Elsewhere, the Third Circuit simply cited itself as the source of this purported obligation, which it manufactured by reading language from its prior decisions out of context. Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13); Industry.Br.34-35.

The Commission explained long ago that "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership." *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 94 (1985) ("1985 Order").[5] And until the Third Circuit dictated otherwise, the FCC typically did not address minority and female ownership in reviewing structural ownership limits under Section 202(h). Industry.Br.39-40. Even after the Third Circuit so dictated, the Commission still did not purport to treat that issue as dispositive in the *Reconsideration Order*. *See supra* 14-15; Industry.Br.40-41. In sum, the Commission has treated minority and female ownership as at most an "ancillary" part of Section 202(h) reviews. Resp.Br.23.

Unsurprisingly, therefore, no authority supports Respondents' assertion that "[t]he Commission's ownership rules . . . are key instruments" to foster minority and female ownership. Resp.Br.5. Respondents' historical sources address either separate initiatives distinct from the structural ownership limits (such as the *Diversity Order* and *Incubator Order*, Resp.Br.31, 32), or viewpoint diversity, not minority and female ownership diversity.

Respondents' own sources show the FCC has promoted minority and female ownership directly through targeted measures such as "awarding a

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[5] Respondents dismiss the Commission's statement as "involv[ing] a national rule," not a local rule. Resp.Br.32 n.9. Even if that distinction were relevant to "'diversity of views,'" Resp.Br.5 (citation omitted), it has no bearing on the relevance of minority and female ownership to structural ownership limits. That is why the Commission's 2002 review cited the 1985 Order as precedent on this point. 18 FCC Rcd. at 13634 & n.68.

minority preference in comparative broadcast hearings," instituting "minority tax certificate and distress sale policies," and "adopt[ing] minority ownership incentives" in the 1985 Order. *In re Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities*, 10 FCC Rcd. 2788, 2788-89 (1995) ("1995 Ownership Diversity"). Indeed, the Commission explained in kicking off the 2014 review that "[t]o the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law," it did "not believe that any such action should be in the form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees." *In re 2014 Quadrennial Regulatory Review*, 29 FCC Rcd. 4371, 4456-57 (2014). So, while "the Commission has adopted *rules* to foster diverse ownership opportunities," Resp.Br.5 (emphasis added), it has not adopted *structural ownership limits*—the object of Section 202(h)—to promote that goal.

Respondents further muddy the historical record by selectively quoting sources that address *viewpoint* diversity, rather than *minority and female ownership* diversity. *See*, *e.g.*, Resp.Br.4 (citing *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-802 (1978); *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-05 (1956); and *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).[6] Of these two concepts, only viewpoint diversity is an aspect of the public

[6] Similarly, when the D.C. Circuit noted "'the public interest' has historically embraced diversity" as a "permissible" consideration under Section 202(h), it referred to "diversity of viewpoints." *Fox TV*, 280 F.3d at 1034, 1036, 1042-43. *Contra* Resp.Br.8.

interest as historically interpreted by this Court and the Commission. For example, in a 1995 rulemaking addressing structural ownership rules, the FCC noted that its "concern for ensuring diversity of *viewpoints*" had "[t]raditionally" been as important a factor as preventing "undue economic concentration." *In re Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, 3547 (1995) ("1995 Television Review") (emphasis added).[7] And the Commission enumerated "viewpoint, outlet and source diversity"—not minority and female ownership—as "the three types of diversity that [its] rules ha[d] attempted to foster." *Id.*; *accord In re 1998 Biennial Regulatory Review*, 15 FCC Rcd. 11058, 11062 (2000) ("Our diversity analysis focuses upon . . . the three types of diversity (i.e., *viewpoint, outlet and source*) that our broadcast ownership rules have attempted to foster." (emphasis added)).

Neither the Commission's past efforts to promote minority and female ownership outside the context of structural ownership limits, nor its emphasis on viewpoint diversity in that context, provides any basis for the Third Circuit's finding that minority and female ownership is an "'important aspect of the problem'" that the Commission was bound to consider as a matter of administrative law. Pet.App.41a. The

[7] In the 1995 Television Review, the Commission expressed concern that "relaxing local ownership limits could increase the price of broadcast television stations," which could affect "the ability of minorities and women to purchase TV stations," but addressed that issue in a separate proceeding. 10 FCC Rcd. at 3572; *id.* at 3584 ("[c]omments relating to the effects of [certain attribution rules] on ownership of broadcast stations by minorities and women[] should be directed to" the 1995 Ownership Diversity proceeding).

APA, like Section 202(h), did not require the Commission to engage in this analysis in the *Reconsideration Order*.

B. The FCC Adequately Considered Minority And Female Ownership.

Because the Third Circuit's view that the Commission must assess the impact of rule changes on minority and female ownership was legally baseless, this Court need not decide whether the Commission adequately did so. In any event, the Commission's consideration of that issue easily meets the standard for reasoned decisionmaking. Industry.Br.42-46.

Respondents focus myopically on purported flaws in the Commission's data analysis but fail to show anything irrational. Echoing the Third Circuit, Respondents assert that "the Commission '*confined* its reasoning [on diversity] to an insubstantial statistical analysis of unreliable data.'" Resp.Br.36 (alteration in original; emphasis added) (quoting Pet.App.40a). That assertion is patently incorrect. With respect to the Newspaper/Broadcast Cross-Ownership Rule, the Commission relied chiefly on the *absence* of record evidence linking minority and female ownership levels to the Rule. *See* Pet.App.122a. Similarly, the Commission concluded that "the record *fail[ed] to demonstrate* that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership." Pet.App.138a (emphasis added). The Commission likewise found that "the record *does not support* a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels." Pet.App.161a-162a (emphasis added). In each instance, the Commission offered a reasoned explanation based primarily on the absence of record evidence, with only a passing reference to the contested data. Pet.App.120a, 139a, 161a.

Respondents resort to nitpicking the Commission's statistical analysis because they cannot and do not challenge the broader conclusions supporting the Commission's rule changes. *See supra* 12-13. But *State Farm* grants no authority to second-guess agency decisions by deconstructing stray lines in the administrative record. *See* 463 U.S. at 43 (courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned" (citation omitted)).

Respondents' criticisms of the Commission's statistical analysis are also overblown. The only data in the record showed that the number of minority-owned television stations doubled between 1998 (the year before the Commission relaxed the Local Television Rule) and 2013. *See* JA174-175 & nn.214-215. Although the data were imperfect—which the Commission candidly acknowledged, *see* JA176—the data still reasonably "suggest[ed]" that prior rule changes had "not resulted in reduced levels of minority and female ownership," Pet.App.139a.

The Commission adequately considered the data it had, and was under no obligation to conduct "new empirical research or an in-depth theoretical analysis," Pet.App.41a, or to "correct[ ]" that data, Resp.Br.46. Industry.Br.45; *Vt. Yankee*, 435 U.S. at 524.[8] Nor was a "better analysis" available.

[8] Respondents' *amici* go so far as to suggest that the Commission should have obtained more data by digging through its archives,

Resp.Br.39. Respondents point to studies by Free Press, but these studies are stale, dating from 2007—a decade before the *Reconsideration Order*. CA3.JA472, 548. Besides, those studies' "corrected" data, like the data the Commission cited, indicated a decline in minority-owned television stations between 1998 and 2000, followed by an overall increase (in absolute and percentage terms) by 2006. CA3.JA569.

In the end, Respondents give the game away by insisting that the Commission cannot make *any* rule changes until it obtains and provides a "reasoned analysis" of empirical evidence of "past events." Resp.Br.48. That poses an impossible task: The ownership rules have been preserved in amber for decades as a result of the Third Circuit's decisions, necessarily limiting the probative value of any data from long-past rule changes (if such data exist), especially in light of dramatic intervening marketplace changes. Hamstringing the Commission's ability to achieve reform might serve Respondents' goal of thwarting the least bit of consolidation. But it would disserve Congress' goal of ensuring that the rules keep pace with current competitive conditions, and would impose immense harms on broadcasters, newspapers, and the American public.

III. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S REMEDY AND RETENTION OF JURISDICTION.

1. Even if the Commission's consideration of minority and female ownership were somehow

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Amicus.Br.Professors 13-15, but the agency was under no duty to do that either.

deficient, the Third Circuit went overboard in its choice of remedies.

First, the Third Circuit improperly vacated the embedded radio markets provision and repeal of the TV Joint Sales Agreement Attribution Rule. The parts of the *Reconsideration Order* addressing those issues do not even include the purportedly deficient analysis, Pet.App.164a-199a, and Respondents do not claim otherwise. Moreover, Respondents do not dispute that they failed to challenge those FCC actions, pointing instead to arguments made by others. *Cf.* Resp.Br.53 n.16. If Respondents believed these actions were unlawful, they needed to say so before the Commission and the Third Circuit. *See United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Second, the Third Circuit erred in vacating the *Incubator Order* and the *Second R&O*'s eligible-entity definition, which are separate and distinct from the ownership rules and again do not contain the supposedly inadequate analysis. Respondents admit the Third Circuit found no error in the *Incubator Order* or eligible-entity definition, but nevertheless insist that triple vacatur was warranted based on a dissenting Commissioner's view that all three orders are "interrelated." Resp.Br.52 (citing Pet.App.292a). Respondents cite no authority for the proposition that a court may invalidate lawful regulations solely because they are related to another, purportedly unlawful regulation.

Third, the Third Circuit erred in vacating rather than remanding the FCC's actions. Respondents do not deny that the Commission has statutory authority to adopt the *Reconsideration Order*'s reforms, or that the Commission could lawfully "reach the same result on remand." Resp.Br.3. They merely object to the Commission's *explanation* for its action, based solely on a factor that Section 202(h) says not a word about. An explanatory error on an ancillary consideration would at most justify remand without vacatur. Industry.Br.49.

Respondents' invocation of disruptive consequences is equally unavailing. The Third Circuit's obstruction of the Commission's attempted reforms has frozen in place rules preventing broadcasters and newspapers, unlike their competitors, from obtaining needed "investment[s] and operational expertise." Pet.App.101a-107a. That impasse has wrought significant and irreversible consequences, which Respondents overlook entirely: Retention of unnecessary ownership restrictions has contributed to the closure of hundreds of newspapers and massive revenue losses at stations. Pet.App.98a-101a; *see also* Affiliates.Amicus.Br.12-30; Gray.Amicus.Br.20-34. Those harms are precisely the disruptive consequences Section 202(h) was designed to avert.

2. Respondents also fall short in defending the Third Circuit's assertion of continuing jurisdiction over Section 202(h) proceedings. Although Respondents argue that aggrieved parties may select any venue for challenges to "new, distinct agency rulemakings," Resp.Br.54, that is cold comfort given the Third Circuit's unambiguous decree that "this panel again retains jurisdiction over the remanded issues," Pet.App.45a. Those "issues" effectively implicate any future changes to the ownership rules. The panel clearly intends to maintain its status as the national media ownership review board.

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The Third Circuit required the Commission to treat a policy never mentioned in Section 202(h) as a mandatory and dispositive factor, fly-specked the Commission's analysis, ordered the Commission to collect additional data, entered a triply overbroad remedy, and finished up by reasserting perpetual jurisdiction. This is "judicial intervention run riot." *Vt. Yankee*, 435 U.S. at 557. This Court should clear the way for the FCC finally to achieve the "regulatory reform" Congress set in motion 25 years ago.

CONCLUSION

This Court should reverse the decision below and instruct the Third Circuit to deny Respondents' petitions for review.

Respectfully submitted.

EVE KLINDERA REED
JEREMY J. BROGGI
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20036
(202) 719-7000

Counsel for Petitioner Nexstar Inc. f/k/a Nexstar Broadcasting, Inc.

HELGI C. WALKER
Counsel of Record
JACOB T. SPENCER
MAX E. SCHULMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
hwalker@gibsondunn.com

Counsel for Petitioner National Association of Broadcasters

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KENNETH E. SATTEN
CRAIG E. GILMORE
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141

Counsel for Petitioners
Bonneville International and
The Scranton Times L.P.

DAVID D. OXENFORD
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141

Counsel for Petitioner
Connoisseur Media LLC

KEVIN F. KING
ANDREW SOUKUP
RAFAEL REYNERI
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Petitioners
Fox Corporation and
News Media Alliance

SALLY A. BUCKMAN
PAUL A. CICELSKI
LERMAN SENTER PLLC
2001 L Street, NW
Suite 400
Washington, DC 20036
(202) 429-8970

Counsel for Petitioner
News Corporation

MILES S. MASON
JEETANDER T. DULANI
JESSICA T. NYMAN
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 17th Street, NW
Washington, DC 20036
(202) 663-8000

Counsel for Petitioner
Sinclair Broadcast Group, Inc.